STATE OF INDIANA	)	IN THE ST. JOSEPH SUPERIOR COURT
	) SS:	
ST. JOSEPH COUNTY	)	

STEVE BONNEY, JOHN GIBSON, ANITA GIBSON, TOM PIETRZAK, RANDY NACE, CLARDINA NACE, JUNE NACE, and THE CITIZENS ACTION COALITION OF INDIANA, INC., an Indiana not for profit corporation, *Plaintiffs*,	)	
v.	)	CASE NO. 71DO7-0604-**PL**00144
INDIANA FINANCE AUTHORITY, STATEWIDE MOBILITY PARTNERS, LLC, ITR CONCESSION COMPANY, LLC, THE INDIANA DEPARTMENT OF TRANSPORTATION, MITCHELL E. DANIELS, Governor of Indiana, and TIM BERRY, Treasurer of Indiana, *Defendants.*	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This case came before the Court for hearing on May 11 and 15, 2006, on the Petition of Defendants, the Indiana Finance Authority ("IFA"), Governor Mitchell E. Daniels, Jr., Treasurer Tim Berry, and the Indiana Department of Transportation ("INDOT"), to Certify the Action as a Public Lawsuit and to Establish Surety Bond and/or in the Alternative to Dismiss. Having considered the evidence presented and the arguments of counsel, the Court hereby enters its Findings of Fact, Conclusions of Law, and ruling on said Petition.

I. INTRODUCTION

This case was initiated on April 12, 2006 by Plaintiffs, Steve Bonney, John Gibson, Anita Gibson, Tom Pietrzak, Randy Nace, Clarinda Nace, June Nace, and The Citizens Action Coalition of Indiana, Inc., an Indiana not for profit corporation.

This case named as Defendants the IFA, Mitchell E. Daniels, Jr., in his official capacity as Governor of Indiana, Tim Berry, in his official capacity as Treasurer of Indiana, INDOT, ITR Concession Company, LLC ("ITR"), and the Statewide Mobility Partners, LLC ("SMP").

On April 19, 2006, a Petition to Certify as a Public Lawsuit and to Establish Surety Bond and/or in the Alternative to Dismiss (the "Petition") was filed by the Defendants IFA, Governor Daniels, Treasurer Berry, and INDOT, by their respective counsel. Plaintiffs, by counsel, filed a Brief in Opposition to Motion to Certify this Case as a Public Lawsuit. The IFA, by counsel, filed a Pre-Hearing Brief and Reply in Support of Petition to Certify as a Public Lawsuit.

A hearing was held on the Petition on May 11, 2006 and May 15, 2006 (the "Hearing"). The Plaintiffs were given until May 17, 2006 to submit, as additional exhibits, a representative sample of existing lease agreements and designations of evidence from the depositions of Ryan Kitchell and Charles E. Schalliol, which they did. Thereafter, the parties were given until May 19, 2006, at 4:00 p.m., to file post-hearing memoranda and proposed findings of fact, conclusions of law and proposed order regarding the matters at issue in the Petition, which they did.

II. FINDINGS OF FACT

A. Plaintiffs' Complaint

1. Plaintiffs' complaint challenges provisions of House Enrolled Act 1008 (the "Act" or "HEA 1008"), which was passed by the Indiana General Assembly and a seventy-five year (75) lease ("Lease") of the Indiana Toll Road ("Toll Road") that is scheduled to be entered into, pursuant to that statute, on or about June 30, 2006. The Governor signed the

legislation on March 22, 2006. Less than a week later, the IFA announced the selection of the company (ITR) that would obtain and operate the Toll Road, triggering a fifteen-day (15) limit for challenges to the Lease. On April 12, 2006, Plaintiffs timely brought this case.

2. Plaintiffs' Complaint for Declaratory and Permanent Injunctive Relief consists of nine (9) Counts, briefly summarized as follows:

a. Count I alleges that the Act allows the State to dispose of the proceeds received from the Lease by directing them into various highway construction funds in violation of Article 1 §23, Article 8 §2, and Article 10 §2 of the Indiana Constitution. Plaintiffs further allege that the proceeds should be deposited into the State's General Fund to pay State Public Debt or the State's Common School Fund.

b. Count II alleges that both the Act and the Lease grant to the lessee, referred to in the Lease as the "Concessionaire", certain tax exemptions and an indemnification by the IFA from liability to pay certain taxes in violation of Article I §23, Article 10 §1, and Article 11 §12 of the Indiana Constitution.

c. Count III alleges that both the Act and the Lease allow the State to facilitate future financing by the Concessionaire by subordinating the state's security interest in the Toll Road and lending the State's credit to the Concessionaire in violation of Article I §23 and Article 11 §12 of the Indiana Constitution.

d. Count IV alleges that the Act contains certain unconstitutional special laws that prohibit construction of I-69 through Perry Township, limit the designation of the Indianapolis to Martinsville leg of the I-69 extension as a toll road, create local construction funds for those counties through which the Toll Road runs and transfer operation of the Toll

Road to a private company, all in violation of Article IV §22 and §23 of the Indiana Constitution.

e. Count V alleges that the Act and the Lease grant an exclusive franchise to the Concessionaire to operate a public work, namely, the Toll Road in violation of Article 1 §23 of the Indiana Constitution.

f. Count VI alleges that ITR and SMP are not registered with the Indiana Secretary of State to do business within the State of Indiana.

g. Count VII alleges that the Act provides for an unreasonably short statute of limitations within which to challenge the validity of the Lease that does not apply to any other legal action and therefore constitutes a special law in violation of Article IV §22 and §23 of the Indiana Constitution. Plaintiffs further allege that it deprives citizens of a remedy for injury done by due course of law and grants to some citizens privileges and immunities not granted to others in violation of Article 1 §12 and §23 of the Indiana Constitution.

h. Count VIII alleges that the Act grants to the Indiana Executive Branch the power to turn any road (within the exception of the part of I-69 that would run from Indianapolis to Martinsville) into a toll road, which power belongs to the Legislature in violation of the separation of powers provision of Article 3 §1 of the Indiana Constitution. Alternatively, the Plaintiffs claim that if the power to designate existing roads as toll roads is an executive function, then the provision of the Act prohibiting the designation of that portion of I-69 that would run from Indianapolis to Martinsville as a toll road without legislative approval violates Article 3 §1 of the Indiana Constitution.

i. Count IX alleges that those provisions of the Act that Plaintiffs claim to be invalid are not severable from the remainder of the Act and therefore the entire Act and the Toll Road Lease are invalid.

The Plaintiffs seek to have the Court declare invalid the Act and the Lease in their entirety and enjoined from enforcement.

3. Whenever necessary or appropriate for a proper interpretation and analysis of this opinion, these findings of fact shall be construed as conclusions of law and any conclusions of law shall be construed as findings of fact.

B. <u>The Indiana Finance Authority and the Indiana Toll Road.</u>

4. By statute, the Indiana Finance Authority, or IFA,

> is a body politic and corporate, not a state agency, but an independent instrumentality exercising essential public functions. The authority is separate and apart from the state in its corporate and sovereign capacity, and though separate from the state, the <u>exercise by the authority of its powers constitutes an essential governmental, public, and corporate function</u>. [IC §4-4-11-4(a); *see also* May 11, 2006 Hearing Transcript ("Tr.") at 12-13; 81.]

5. The IFA is not the State. *See id.*; *see also* Tr. at 75-76.

6. The IFA owns the Indiana Toll Road. (Tr. at 9-10; 83; *see also* Defendants' Exhibit E, Trust Indenture showing that the IFA owns the Toll Road; *see also* Defendants' Exhibit D, Title Documents and Stipulation.)

7. The real property underlying the Toll Road was expressly dedicated for the purpose of containing the right-of-way for the East/West Toll Road. (*See* Defendants' Exhibit D, Stipulation regarding Title Documents and the representative Title Documents attached as Exhibits thereto.)

C. <u>Proposals and the Bidding Process</u>.

8. In 2005, the IFA began exploring the possibility of leasing the Toll Road for the purpose of generating sufficient revenue to fund a long-term transportation construction program. (Tr. 11-16.)

9. As part of this exploration, Mr. Ryan Kitchell ("Mr. Kitchell") conducted an economic analysis (Plaintiffs' Exhibit 2) to determine what the value of the Toll Road was to the IFA, *i.e.*, to determine the value of continued, historical operations rather than entering into a public/private lease agreement. (Tr. at 84-85.)

10. As such, the IFA's decision on whether to move forward with the leasing process depended upon "the differential between what [the IFA] could get [through a private lease] and what [the IFA] thought [the Toll Road] was worth if [the IFA] continued [along the *status quo*.]" (Tr. at 84-85.)

11. It was important to ascertain "what that *status quo* number was." (Tr at. 84-85.) That way, if the IFA obtained a bid in an amount "a lot better than that, [then the IFA was] interested in doing the deal[,] and if [the IFA] had bids come back and they weren't [as high as the *status quo*]," then the IFA would not move forward with a public/private lease agreement. (Tr. at 85.)

12. As seen on Plaintiffs' Exhibit 2, Mr. Kitchell arrived at a "*status quo*" value of roughly $1.4 billion. (Tr. at 91; *see also* Plaintiffs' Exhibit 2.) The IFA realized that $1.4 billion was not a precise number (it contains assumptions open to debate). (Tr. at 91-92.) The IFA intended "to take a reasonable but conservative approach" and therefore came up with the $2 billion figure, which was the IFA's floor; *i.e.*, if the IFA did not receive a bid in excess of the $2 billion figure, then the IFA would not be interested in entering into a public/private lease. (Tr. at 92.)

13. The IFA then contacted a series of investment banks that were professionals in major transactions of this sort. (Tr. at 13.)

14. The IFA interviewed three candidates that had expertise in transportation finance to represent IFA in the potential leasing project: Goldman Sachs, Citigroup and Payne Weber. (Tr. at 13-14.)

15. The IFA ultimately concluded that Goldman Sachs had the requisite expertise based in large part on the fact that Goldman had previously represented Chicago in the leasing of the Skyway. (Tr. at 14.)

16. Working with Goldman, the IFA concluded that the best way to get the best offer would be to go through an auction process. (Tr. at 15.)

17. In the summer and early fall of 2005, through a request for proposal process, and with the help of Goldman Sachs, the IFA received responses from eleven (11) legal entities. (Tr. at 15-16.)

18. Goldman Sachs screened the request for proposals for sufficient financial and operating capability. (Tr. at 16.)

19. The IFA certified nine (9) of the potential eleven (11) bidders as having the capability and experience to form a consortium for the purpose of leasing the Toll Road. (Tr. at 16.)

20. The IFA then created an electronic data room to hold all of the documents relating to the Toll Road that the potential bidders would be interested in reviewing. (Tr. at 16-17.)

21. The IFA also provided the potential bidders with an opportunity to spend a full day with the requisite IFA people to allow the bidders an opportunity to have their questions

answered. (Tr. at 17; 84.)

22. At the same time, the IFA began preparing a draft lease, which was sent to each of the potential bidders by the IFA for comments. (Tr. at 17-18; 84.)

23. The IFA also gave the potential bidders an opportunity to take a full day to tour the Toll Road. (Tr. at 17.)

24. At the conclusion of the meetings, the IFA asked the potential bidders to put together a bid. (Tr. 18-19.)

25. The IFA received a total of four (4) bids. (Tr. at 19.)

26. The winning bid was $ 3.8 billion, which was the highest bid by far. (Tr. at 19; 92.)

27. The remaining three bids were held until the April 12, 2006 signing date of the Lease. (Tr. at 19-20; *see also* Defendants' Exhibit A, Lease.)

28. On the April 12, 2006 signing date, the three other bids expired. (Tr. at 19-20.)

29. The IFA's request for proposals process accorded all bidders and potential bidders fair and equal treatment.

D. <u>The Lease</u>.

30. The IFA designated Defendant ITR Concession Company, LLC (the "Concessionaire") as the party to enter into the Indiana Toll Road Concessions and Lease Agreement ("Lease"). (Compl. at 20.)

31. The IFA and the Concessionaire entered into the Lease on April 12, 2006. (Tr. at 19; *see also* Defendants' Exhibit A - Lease.)

32. Upon signing the Lease, the Concessionaire posted (as it was required to do under the terms of the Lease) 10% of the ultimate amount as a letter of credit, or $380 million. (Tr. at 19; 22-23; Defendants' Exhibit A-Lease.)

33. Also on April 12, 2006, the Concessionaire submitted an Application for Certificate of Authority of a Foreign Limited Liability Company to the Indiana Secretary of State and paid the $90.00 application fee.

34. Also on April 12, 2006, the Indiana Secretary of State issued to the Concessionaire a Certificate of Authority to do business in the State of Indiana. (*See* Defendants' Exhibit F, Secretary of State Certificate of Authority.)

35. The Lease was entered into by and executed between the IFA and the Concessionaire only; *i.e*, the Lease is solely between the Concessionaire and the IFA. (*See* Defendants' Exhibit A - Lease.)

36. The State of Indiana is not a party to the Lease. (*See* Defendants' Exhibit A - Lease.)

37. Defendant Statewide Mobility Partners LLC ("SMP") is neither a party nor a signatory to the Lease with the IFA; SMP is not bound by and has no contractual obligations under the terms of the Lease; and SMP has not been granted any rights or privileges under the terms of the Lease. (*See* Defendants' Exhibit A - Lease.)

38. There is no evidence that SMP transacts business within the State of Indiana and would therefore be required to register with the Indiana Secretary of State to obtain a Certificate of Authority to do business in the State of Indiana.

39. Upon closure of the Lease, the Concessionaire is obligated to deposit with the IFA the sum of $3.8 billion for later distribution according to the Act. (*See* Defendants' Exhibit A, Lease; *see also* Compl. at 22.).

40. Pursuant to its terms, the Lease must close on or by June 30, 2006, unless another date is agreed to in writing by the IFA and the Concessionaire. (Tr. at 23; *see also*

Defendants' Exhibit A - Lease §2.2(a).)

41. If the Lease does not close by June 30, 2006, then the Concessionaire has the option of withdrawing from the transaction entirely (Tr. at 23.) provided the failure to close is not as a result of any action or inaction on the part of the Concessionaire.

42. The IFA and the Concessionaire currently plan to close on the Lease on June 28, 2006, or by June 30, 2006. (Tr. at 23; *see also* Defendants' Exhibit A – Lease §2.2(a).)

E. <u>The Lease is not a Sale</u>.

43. The Lease does not affect a sale of the Toll Road; it affects a *lease* of the Toll Road. (Tr. at 30-36; see also Defendants' Exhibit A - Lease.)

44. For example, under the Lease, the IFA retains significant control over the operation of the Toll Road, which is inconsistent with a sale. (Tr. at 30.)

45. The IFA's Operating Standards book sets forth in exacting detail the procedures that the Concessionaire must follow in operating the Toll Road. (Tr. at 30-31; see also Defendants' Exhibit A.) The Operating Standards detail, for example, "how quickly a dead squirrel must be picked up off the road, the answer is eight hours; how quickly a pot hole must be filled, initially 24 hours, a month for permanent; to when road expansion, lane expansion must occur on the road." (Tr. at 30-31.)

46. In addition, the IFA retains a supervisory role over the Concessionaire. (Tr. at 30-31.) For doing so, the Concessionaire must pay the IFA $150,000 per year. (Tr. at 30-31.)

47. The Concessionaire is also required to conduct an annual audit and to provide the financial results of the operation of the Toll Road to the IFA. (Tr. at 32.)

48. Operation of the Toll Road property will revert back to IFA at the end of the 75-year Lease term. (Tr. at 30-32; see also Defendants' Exhibit A - Lease.)

49. Also, as is frequently the case with any kind of real property lease, in the final

five years leading up to the conclusion of the Lease, the Concessionaire must post a letter of credit against its failure to maintain the asset. (Tr. at 32-33.) This assures that the Toll Road is in the condition in which it was required to be maintained during the Lease when the IFA resumes operation. (Tr. at 33.)

50. In addition, during the pendency of the Lease, the IFA has virtually unlimited access to the Toll Road. (Tr. at 33.) No approval, only notice, is necessary. (Tr. at 33.)

51. Furthermore, in certain circumstances where it is in the public interest, the IFA may take over control of the Toll Road during the pendency of the Lease. (Tr. at 33-34.) For example, the Lease provides that the IFA may resume operating control of the Toll Road upon declaration of emergency by the Governor. (Tr. at 33-34.)

52. Furthermore, the Concessionaire must obtain the IFA's consent prior to assigning any of its leasehold interest — either the operating or the underlying rights. (Tr. at 34-35.) Also, the Lease cannot be transferred to anyone outside of Europe, North America, or Australia, and, even then, the IFA has an unlimited right to prohibit such a transfer. (Tr. at 35.)

53. Some aspects of the Toll Road are not even being leased. (Tr. at 35-36.) The Concessionaire is entitled only to toll revenue and to lease payments derived from the rental of gas stations and convenience stores. (Tr. at 35-36.) The IFA is entitled to all other revenue that is generated by the Toll Road. (Tr. at 35-36.) For example, naming rights, fiber optics, and utility provisions remain with the IFA. (Tr. at 35-36.)

54. As admitted by Plaintiffs, the foregoing characteristics evidence a lease, not a sale. (Tr. at 35; *see also* Nace Depo. at p. 14, ln. 25 to p. 16, ln. 23; Smith Depo. at p. 25, ln. 3-23; Bonney Depo. at p. 24, ln. 4-11; Pietrzak Depo. at p. 33, ln. 15-20.)

F. House Enrolled Act 1008.

55. One contingency on the bidding process of the Lease was "satisfactory legislation to empower the signing." (Tr. at 19.)

56. With respect to House Enrolled Act 1008 (the "Act" or "HEA 1008"), the General Assembly found:

> (1) There is a public need for timely development and operation of transportation facilities in Indiana that address the needs identified by the department, through the department's transportation plan and otherwise, by accelerating project delivery, improving safety, reducing congestion, increasing mobility, improving connectivity, increasing capacity, enhancing economic efficiency, promoting economic development, or any combination of those methods.
>
> (2) This public need may not be wholly satisfied by existing methods of procurement and project delivery in which transportation facilities are developed, financed, or operated.
>
> (3) Authorizing private entities to do all or part of the development, planning, design, construction, maintenance, repair, rehabilitation, expansion, financing, and operation of one (1) or more transportation facilities may result in the availability of the transportation facilities to the public in a more timely, more efficient, or less costly fashion, thereby serving the public safety and welfare. [IC 15.7-1.]

57. With respect to HEA 1008, the General Assembly stated its intention as follows:

> It is the intent of this article to:
>
> (1) encourage investment in Indiana by private entities that facilitate the development, planning, design, construction, maintenance, repair, rehabilitation, expansion, financing, and operation of transportation facilities; and
>
> (2) grant public and private entities the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this article. [IC 15.7-3.]

58. Prior to the April 12, 2006 signing of the Lease, on or about March 15, 2006, Governor Daniels signed HEA 1008 into law. (Compl.)

59. The Act, also referred to as "Major Moves," in part establishes a means for private operation of the Indiana East/West Toll Road. (Compl. at 18; *see also* Tr. at 20; Defendants' Exhibit B, HEA 1008.)

60. Pursuant to the Act, the IFA is authorized to select an operator with whom the IFA may enter into a public/private agreement. (*See* Defendants' Exhibit B, HEA 1008.)

G. Disbursement of Lease Proceeds.

61. HEA 1008 lays out in detail how Lease proceeds are to be disbursed. All ninety-two (92) Indiana counties benefit under the Act by receiving a portion of the $3.8 billion. (Tr. at 37-38; *see also* Defendants' Exhibit C, List of financial benefits from Major Moves to each of the ninety-two (92) counties, according to the State's website; May 15, 2006 Hearing ("05-15-06 Hrg."), Moses (admitting that money from Major Moves is distributed all over the State, and not to just a few counties.))

62. In adopting HEA 1008, the legislature specifically acknowledged that the Act was intended to address statewide transportation and funding concerns.

> The general assembly finds and determines that: (1) the state has limited resources to fund the maintenance and expansion of the state transportation system, including toll roads, and therefore alternative funding sources should be developed to supplement public revenue sources; (2) the Indiana finance authority should be authorized to solicit, evaluate, negotiate, and administer agreements with the private sector for the purposes described in subdivision (1); and (3) it is necessary to serve the public interest and to provide for the public welfare by adopting this article for the purposes described in this article. [Section 39 of HEA 1008 (Ex. B, p. 42).]

63. The Act will allow the completion of road construction and other projects throughout the entire state. (*See* Defendants' Exhibit B.)

64. The $3.8 billion must first be used to pay the IFA's incurred expenses, nearly $25 million dollars. (Tr. at 38.)

65. Approximately $100 million of the $3.8 billion will be used to pay off the

balance of the IFA's existing Toll Road debt. (Tr. at 38-39.)

66. The remainder of the $3.8 billion will then be placed into the Major Moves Construction Fund, from which, pursuant to the Legislature's direction, money will be disbursed to the seven (7) Toll Road counties.[1] (Tr. at 38-39.)

67. The balance of the Major Moves Construction Fund money will be used, to fund other road projects throughout Indiana. (Tr. at 38-39; *see also* Defendants' Exhibit B-HEA1008.)

68. The largest portion of the $3.8 billion will be allocated to Defendant Indiana Department of Transportation ("INDOT") to complete its ten-year plan, which includes upgrading U.S. 31 and building the Ports to Ports Road, the Hoosier Heartland Highway, and the extension of I-69 into southern Indiana. (Tr. at 39; *see also* Defendants' Exhibit B-HEA1008.)

69. Each of the five (5) counties on the eastern end of the Toll Road will receive $40 million. (Tr. at 39; *see also* Defendants' Exhibit B-HEA 1008.)

70. The two (2) most western Toll Road counties (Lake and Porter) receive somewhat less money because they are members of the Northwest Indiana Regional Development Authority, which will receive a separate distribution under the Act. (Tr. at 39; Defendants' Exhibit B-HEA 1008.)

71. Specifically with respect to St. Joseph County, where this Court sits, approximately $20 million will be disbursed to the County, approximately $13 million to

[1] Although testimony provided on May 15, 2006 at the Hearing indicates that Plaintiffs argue that two of the Toll Road counties that presumably were meant to be described by two of the population parameters do not exactly fall within those population parameters, under IC 1-1-3.5-3, the General Assembly should have and did in fact use the decennial census in describing its population parameters. Therefore, those census numbers govern the population parameters, and any numbers that came after the 2000 census are irrelevant.

South Bend, and approximately $7 million to Mishawaka and other locales. (Tr. at 39-40.) These funds are designated for highway and road upgrades and construction and infrastructure projects. (Tr. at 40.)

72. The Act also provides that $500 million must be put aside in a Next Generation Trust Fund. The Trust Fund shall be a charitable trust separate from the state. Both the principal and interest income that accrues from the investment of the principal can be used to fund highway, road and bridge projects long term. (Tr. at 38; Defendants' Exhibit B-HEA 1008.)

73. As described above, certain counties along the Toll Road receive more money vis-à-vis the General Assembly than do other counties. (Tr. at 38-40.) Because the IFA had already started down the road of putting into place toll increases for both passenger cars and trucks, the General Assembly was concerned that these increases, whether implemented by the IFA or the Concessionaire, would cause traffic to be diverted onto local roads." (Tr. at 40.) As such, the General Assembly wanted to make sure that money was set aside for those counties most closely aligned with the Toll Road, who suffer the greatest impact from the Toll Road, which can be used to build things like additional lanes and bypasses to discourage diversion off the Toll Road. (Tr. at 40.)

H. <u>HEA 1008 Provisions regarding Perry Township and Martinsville</u>.

74. Section 8-15-2-1(d) of HEA 1008 states:

> Notwithstanding any other law, neither the authority nor an operator selected under IC 8-15.5 may carry out any of the following activities under this chapter unless the general assembly enacts a statute authorizing that activity:
>
> (1) Carrying out construction for Interstate Highway 69 in a township having a population of more than seventy-five thousand (75,000) and less than ninety-three thousand five hundred (93,500).
>
> (2) Imposing tolls on motor vehicles for use of the part of an interstate

> highway that connects a consolidated city and a city having a population of more than eleven thousand five hundred (11,500) but less than eleven thousand seven hundred forty (11,740). [Defendants' Exhibit B, HEA 1008, at IC § 8-15-2-1(d).]

75. Section 8-15-3-9(e) of HEA 1008 states:

> Notwithstanding any other law, the governor, the department, or an operator may not carry out any of the following activities under this chapter unless the general assembly enacts a statute authorizing that activity:
>
> (1) Approve the location of a toll way, other than Interstate Highway 69 between Interstate Highway 64 and a city having a population of more than eleven thousand five hundred (11,500) but less than eleven thousand seven hundred forty (11,740).
>
> Carry out construction for Interstate Highway 69 in a township having a population of more than seventy-five thousand (75,000) and less than ninety-three thousand five hundred (93,500).
>
> (3) Impose tolls on motor vehicles for use of the part of an interstate highway that connects a consolidated city and a city having a population of more than eleven thousand five hundred (11,500) but less than eleven thousand seven hundred forty (11,740). [Defendants' Exhibit B, HEA 1008, at IC § 8-15-3-9(e).]

76. Perry Township is one of the areas described by the population parameters appearing in Sections 8-15-2-1(d) and 8-15-3-9(e) of HEA 1008. (05-15-06 Hrg., Moses.)

77. Martinsville is the city described by population parameters appearing in Sections 8-15-2-1(d) and 8-15-3-9(e) of HEA 1008. (05-15-06 Hrg., Moses.)

78. Before the portion of the Toll Road between Martinsville and Indianapolis can be designated a toll road, the General Assembly must enact a statute authorizing such designation. (Defendants' Exhibit B, HEA 1008, at IC 8-15-2-1(d), IC 8-15-3-9(e); *see also* Tr. at 114-115.)

79. Before extending I-69 through Perry Township, the General Assembly must enact a statute authorizing such extension. (Defendants' Exhibit B, HEA 1008, at IC 8-15-2-1(d) and IC 8-15-3-9(e); *see also* Tr. at 114-115.)

80. Plaintiffs' witness Mr. Winfield Moses, Jr. ("Moses"), a State representative from Fort Wayne, testified regarding the passage of HEA 1008. (05-15-06 Hrg., Moses.) Moses testified that the provisions relating to Perry Township and Martinsville were not initially included in the House Bill. (05-15-06 Hrg., Moses.)

81. Moses admitted that he was not in any of the Republican caucuses where the Perry Township and Martinsville provisions may have been discussed. (05-15-06 Hrg., Moses.)

82. Prior to their inclusion, the vote was 52 to 47 in favor of Major Moves; after the allegedly special provisions were inserted into HEA 1008, the vote was 51 to 48. (05-15-06 Hrg., Moses.) HEA 1008 actually *lost* one vote after the Perry Township and Martinsville provisions were incorporated into the Act. (05-15-06 Hrg., Moses.)

83. Moses described the counties adjacent to the Toll Road as "unique." (05-15-06 Hrg., Moses.)

84. Despite the temporary restrictions on certain aspects of one particular project until the General Assembly addresses the matter further, the general provisions relating to the remainder of the I-69 extension are applicable in every county of the State through which I-69 might pass. (*See* Defendants' Exhibit B-HEA 1008.)

85. Furthermore, the provisions permitting the designation of the toll road are still applicable in all 92 counties of the State. (*See* Defendants' Exhibit B-HEA 1008.)

I. Lack of Evidence of any "Public Debt."

86. Although Plaintiffs introduced evidence that they claimed established that the State has “Public Debt”, the Court finds that there is no evidence that the State has any “Public Debt”.

87. During the Hearing, Plaintiffs introduced evidence regarding the State

Teachers' Retirement Fund, as an example of "Public Debt."

88. The State Teachers' Retirement Fund is really a composite of two funds: a pre-1996 fund and a post-1996 fund. (Tr. at 71-73.) The post-1996 fund is fully funded. (Tr. at 71-73.) The pre-1996 fund is on a "pays as you go" basis, as provided for by State law. (Tr. at 71-73; *see also* Plaintiffs' Exhibit 1.)

89. The pre-1996 fund has a total unfunded actuarial liability, as of June 30, 2005, of $8.4 billion. (Tr. at 71-72; *see also* Plaintiffs' Exhibit 1 at p. 116.) Each year, the Indiana General Assembly appropriates sufficient funds to provide for the State's estimated liability for the current year. (Tr. at 71-72; Plaintiffs' Exhibit 1 at p. 116.)

90. The unfunded actuarial accrued liability is not a debt because it is not an obligation that is currently owed. (Tr. at 73-74.)

91. Plaintiffs' only witness on an alleged "Public Debt" was Tom Lewandowski ("Lewandowski"), a councilman from the City of New Haven, who was evidently introduced by Plaintiffs in an effort to demonstrate that the City of New Haven has "debt." (05-15-06 Hrg., Lewandowski.) Lewandowski admitted, however, that the City of New Haven has no general obligation debt. (05-15-06 Hrg., Lewandowski.) The "debt" Lewandowski referred to relates to leases and revenue bonds. (05-15-06 Hrg., Lewandowski.) There is no evidence that the State of Indiana is obligated on any of this alleged "debt." *(Id.)*

J. <u>Harm to the IFA if the Lease does not Close by June 30, 2006.</u>

92. Plaintiffs seek permanent injunctive relief, including an order permanently enjoining the IFA from executing and closing the Lease. (Compl. at pp. 1-2.)

93. A principal representation and warranty made by the IFA in the Lease is that "[t]here is no action, suit or proceeding, at law or in equity, or before or by any Governmental Authority pending nor, to the best of the IFA's knowledge threatened against the IFA, which

would have a Material Adverse Effect on (i) the operations of the Toll Road or (ii) the validity or enforceability of this Agreement." (Tr. at 23; Lease §9.1(g)). The IFA does not provide a blanket representation and warranty in the Lease that there will be no action, suit, or proceeding pending relating to the aforementioned subjects or HEA 1008.

94. In the presence of any pending litigation as identified in Section 9.1(g) of the Lease, at the time of the closing, the Lease permits the Concessionaire to withdraw from the process and cancel its letter of credit. (Tr. at 23.)

95. As a result, if the Concessionaire withdraws, the IFA would stand to lose the $3.8 billion up-front rental payment. (Tr. at 24.)

96. Also, in the presence of any such pending litigation as identified in Section 9.1(g) of the Lease, at the time of the closing, the Lease permits the Concessionaire to seek indemnification from the IFA for the Concessionaire's expenses and losses, including the costs of obtaining sufficient financing and having sufficient financing in place at the time of closing. (Tr. at 24.)

97. Although the IFA does not know the details of the Concessionaire's financing, based on the IFA's experience with the convention and stadium building, Mr. Schalliol estimates that the Concessionaire has incurred "tens of millions of dollars" just to obtain financing arrangements, which is the sort of expense that the Concessionaire would seek from the IFA if substantial litigation remains pending as of the closing date. (Tr. at 24.)

98. The IFA would also lose a substantial amount of interest if the Lease does not close on June 30, 2006. (05-15-06 Hrg., Skurski.)

99. The IFA engaged Crowe Chizek & Company LLC to perform a financial analysis of the Toll Road's future revenues and expenditures in order to calculate the net

present value of the Toll Road, if the IFA retained operation over the next seventy-five (75) years. This valuation is based on the historical operation and performance of the Toll Road and the projected future performance based thereon, including toll rate increases over the next five (5) years that are substantially greater than experienced in the past with toll rate increases thereafter consistent with historical rate changes. The net present value was calculated to be $1.92 billion. Crowe is a certified public accounting and consulting firm that has had an external audit relationship with the Toll Road for over fifteen (15) years.

100. Plaintiffs' expert witness, Mr. Roger Skurski ("Skurski"), acknowledged that if the $3.8 billion were invested conservatively, the IFA would earn about $15.8 million a month (or $189.6 million a year) in interest.[2] (05-15-06 Hrg., Skurski.)

101. Plaintiffs, through the testimony of Skurski, suggested at the Hearing that the IFA would do better financially if the Lease failed to close on June 30, 2006. (05-15-06 Hrg., Skurski.) Their suggestion is based primarily on Skurski's testimony that toll rates would be raised over the next 75 years at the maximum or near maximum rate outlined in the Lease whether or not the Toll Road is leased and that the IFA would obtain more money through increased tolls than it would obtain by closing on the Lease.

102. Critically, no evidence, historical or otherwise, was presented from which to draw Skurski's conclusion that toll rates will increase at the rate that Skurski theorizes they would be raised if the Toll Road remains in the IFA's hands.

103. To the contrary, as Mr. Schalliol testified, the State has historically gone long periods of time, in fact from 1985 to the present, without raising tolls at all. (Tr. at 41-42.) When answering questions from this Court, Skurski himself admitted that the government has

[2] Skurski worked off the assumption that a reasonable rate of return on the $3.8 billion would be 4.5 - 5%. (05-15-06 Hrg., Skurski.)

certain public policy concerns that prevent the raising of tolls on any regular basis. (05-15-06 Hrg., Skurski.)

104. So, Skurski's assumption that tolls would be raised at or near the same rate under the IFA's control as they would be raised under private ownership has no basis in fact, and would require this Court to speculate.

105. Utilizing a number of different variables for traffic growth rate, operating expense growth rate, and discount rate, Skurski arrived at net present value figures for the Toll Road ranging from $5.35 billion to $19.81 billion. (5-15-06 Hrg., *Skurski*; Plaintiffs' Exhibit 21.)

106. All the parties agree that the Toll Road has a net present value and they agree upon the factors that should be considered in determining that value but they have widely divergent positions as to the various rates that should be utilized for each of the factors. Therefore, there is significant disparity in their resulting net present value figures.

107. If the Lease does not close on June 30, 2006, the IFA may also suffer consequential losses. As the State Budget Director and CFO for the State of Indiana, and as the Chairman of the IFA, Mr. Schalliol testified as to the present need for the $3.8 billion in cash that will be generated from the Lease, stating:

> [t]here's a tremendous need to get Indiana moving. Jobs, highways. Infrastructure in this State is woeful. Our conditions are not what they ought to be. Indiana is not keeping up with other states in the Midwest. I'm the Budget Director, I can tell you that the revenue growth we're seeing in Indiana is not what the national averages are and here's a chance to turbo charge, to jump start, to get Indiana on the path to growth and success and to put us back putting people to work and it would be, in my opinion, a terrible mistake and a tragedy if this did not happen. [Tr. at 46.]

108. Moreover, failure to close on the Lease may create a tremendous stigma

against the IFA as a financing partner in transactions going forward, having struck a deal and then not going through with it. (Tr. at 24-25.)

109. Furthermore, the IFA could not return to one of the three secondary bidders and acquire one of their signatures on the lease because those bids no longer exist. Those were consortiums to begin with and the bids have lapsed, expired, or are no longer in existence. (Tr. at 25.)

110. Restarting the bidding process and taking that process through its conclusion would take the IFA a great many months. (Tr. at 28.)

111. HEA 1008 requires entry into a lease on or by August 1, 2006 for the Lease to be effective. (Tr. at 25; see also Defendants' Exhibit B.) Uncontradicted testimony evidences that there is simply no way a process like that which the IFA already went through with the Concessionaire could be restarted and completed by August 1, 2006. (Tr. at 25.)

112. If the Lease does not close by June 30, 2006, there is insufficient time to obtain any other bid unless the August 1, 2006 sunset provision of HEA 1008 is changed. (Tr. at 28.) Each of the original bidders spent millions of dollars to make their bids because they all conducted their own highway traffic studies to do their own projections, and because those bidders all had their own financial experts and consultants. (Tr. at 28.) It is unlikely that any bidder would incur those expenses again without a statute that allows enough time for a lease to actually go forward and close. (Tr. at 28-29.)

113. Thus, the IFA would need to return to the Legislature and obtain an amendment to HEA 1008 because of the IFA's current inability to sign a lease with any party after August 1, 2006. (Tr. at 29.) With the General Assembly out of session, this amendment process could take at least one year.

114. If the current transaction does not go through, it is also highly unlikely that other parties would even express significant interest in leasing the Toll Road from the IFA. (Tr. at 26.) To date, there has been only one lease transaction involving an existing toll road in the United States (the Chicago Skyway lease). (Tr. at 26.) Other than Illinois, Indiana was the only state to authorize a transaction like this. (Tr. at 26-27.)

115. Now, however, interest in toll road leases is apparently growing: Illinois is considering leasing its state roads, New Jersey considering entering into a lease like this one, and transactions have been proposed in Texas and California as well. (Tr. at 27.) According to Mr. Schalliol's unrebutted testimony, the time is approaching "where there's going to be more supply than demand for these transactions and the prospects of future deals bringing the same kind of massive premium that [the IFA] got in this one … is very low." (Tr. at 27.)

K. Plaintiffs' Challenges: Personal Perceptions of Proper Public Policy

116. In addition to the constitutional challenges, the Plaintiffs oppose the Lease and HEA 1008 for a variety of other reasons, none of which are constitutionally based.

117. Plaintiff Citizens Action Coalition of Indiana, Inc. ("CAC") has passed a resolution opposing the extension of I-69 because of environmental concerns. (05-15-06 Hrg., Mr. Grant Smith ("Smith"); *see also* Smith Depo. at p. 11, ln. 2 to ln. 17; p. 12, ln. 3 to p. 13, ln. 24; p. 14, ln. 23 to p. 16, ln. 8; p. 65, ln. 18-20; p. 20, ln. 21-25; 46, ln. 23 to p. 47, ln. 23.) The CAC also opposes the public policy of privatization. (05-15-06 Hrg., Smith; *see also* Smith Depo at p. 52, ln. 7 to p. 53, ln. 1; p. 60, ln. 25 to p. 61, ln. 8; p. 49, ln. 15-25.)

118. Plaintiff Bonney ("Bonney") opposes the Lease because he wants to block the construction of the I-69 extension. Bonney owns a farm in Greene County, and the proposed route for the I-69 extension will run through his farm. (05-15-06 Hrg., Bonney; *see also* Bonney Depo. at p. 28, ln. 18 to p. 29, ln. 23; p. 7, ln. 19 to p. 8, ln. 10; 11, ln. 4 to p. 12, ln.

9; p. 56, ln. 23 to p. 57, ln. 2; p. 57, ln. 17 to p. 58, ln. 20; p. 49, ln. 23 to p. 50, ln. 17; p. 55, ln. 1 to p. 56, ln. 2; p. 16, ln. 18 to p. 19, ln. 8; p. 18, ln. 14 to p. 19, ln. 8; p. 75, ln. 19-25; p. 44, ln. 24 to p. 45, ln. 13; p. 44, ln. 24 to p. 45, ln. 13)

119. Plaintiff Pietrzak ("Pietrzak") opposes the Lease because he fears that higher tolls might cause some traffic to be diverted through his hometown of New Carlisle. (05-15-06 Hrg., Pietrzak; *see also* Pietrzak Depo. at p. 15, ln. 25; p. 15, ln. 25 to p. 16, ln. 24; p. 15, ln. 25 to p. 16, ln. 24; p. 15, ln. 25 to p. 16, ln. 24; see also Id. at p. 67, ln. 25 to p. 68, ln. 19; p. 21, ln. 14 to p. 22, ln. 6; p. 62, ln. 10 to p. 64, ln. 9; p. 79, ln. 9 to p. 80, ln. 10; see also Id. at p. 82, ln. 24 to p. 83, ln. 12; p. 44, ln. 2 to p. 46, ln 14; p. 25, ln. 5-17; p. 29, ln. 9-15; p. 14, ln. 1-11.)

120. Plaintiff Randy Nace ("Nace") opposes the Lease because he is a truck driver and does not want to pay higher tolls. (05-15-06 Hrg., Nace; *see also* Nace Depo at p. 45, ln. 22 to p. 47, ln. 25; p. 11, ln. 5 to p. 12, ln. 24; p. 8, ln. 7 to ln. 19; p. 50, ln. 10-11; p. 29, ln. 9-15; p. 14, ln. 1-11.) Nace also opposes leasing land to foreigners, and believes that the Toll Road "belongs in the United States of America. And American money spent on it stays in America, period." (05-15-06 Hrg., Nace; *see also* Nace Depo. at p. 38, ln. 7 to ln. 21; p. 14, ln. 1-11; p. 14, ln. 16 to p. 16, ln. 23; p. 49, ln. 25 to p. 51, ln. 6; p. 52, ln. 2-9; p. 29, 18-21; p. 46, ln. 20 to p. 47, ln. 25; p. 54, ln. 11; p. 28, ln. 12 to p. 30, ln. 3; p. 28, ln. 4 to ln. 6; p. 34, ln. 3 to ln. 17.)

III. CONCLUSIONS OF LAW

A. The Public Lawsuit Statute.

121. "Public Lawsuits" are defined and governed by IC 34-13-5-1, *et seq.*

122. For purposes of IC 34-13-5, the term "Public Lawsuit" means:

> 1. any action in which the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement by a municipal corporation is questioned directly or indirectly, including but not limited to suits for declaratory judgments or injunctions to declare invalid or to enjoin the construction, financing, or leasing; and
>
> 2. any action to declare invalid or enjoin the creation, organization, or formation of any municipal corporation. [IC § 34-6-2-124(a).]

123. For purposes of IC § 34-13-5, the term "municipal corporation" means:

> (1) a:
>
> a) local subdivision of the state; or
>
> b) public instrumentality or public corporate body created by state law; including but not limited to cities, towns, townships, counties, school corporations, special taxing districts, conservancy districts, and any other local public instrumentality or corporation that has the right to sue and be sued;
>
> (2) a corporate or other entity that leases a public improvement to a municipal corporation; or
>
> (3) the governing body of a municipal corporation and its members and officers in their official capacity. [IC § 34-6-2-86.]

124. The Public Lawsuit Statute was designed to protect municipal corporations, as defined *supra*, seeking to implement public improvement projects from harassing and meritless litigation that has the intended or unintended effect of obstructing or delaying those projects. *See State ex rel. Haberkorn v. DeKalb Circuit Court*, 241 N.E.2d 62 (1968).

125. As observed by the Indiana Supreme Court, the Public Lawsuit Statute "was adopted as a protection against a flood of harassing litigation which was obstructing and delaying public improvements at prohibitive costs." *Haberkorn*, 251 Ind., at 288. For,

> [i]t is true that under the state law prior to the adoption of [the Public Lawsuit Statute], a determined plaintiff could keep a suit in being from two to six years; and in many cases the mere filing of the action delayed beyond saving the intricate planning of the project regardless of the merits of the action.

> If litigation is filed and a legal opinion cannot be given, bonds will remain unsold or undelivered. If this persists for any project for more than six months to a year, construction contractors in inflationary times cannot stand by their bids, and the project as planned and the litigation opposing it become moot. In the meantime, taxpayers, in those cases where the endeavor is legally correct, have suffered by substantially increased construction costs. [*Id.*]

B. <u>This Action is a Public Lawsuit except for Count IV relating to the future development of I-69 & Count VIII.</u>

126. This action is a "Public Lawsuit" with the exception of the Count IV claim that the Act contains certain unconstitutional special laws that prohibit construction of I-69 through Perry Township and limit the designation of the Indianapolis to Martinsville leg of the I-69 extension along Route 37 as a toll road and Count VIII in which Plaintiffs allege that certain provisions of the Act violate the separation of powers clause in Article 3, §1 of the Indiana Constitution. The reasons for these exceptions will be explained hereinafter. *See* IC 34-13-5-1, *et seq*.

127. **<u>First</u>**, this lawsuit has been filed against the IFA, which is a "municipal corporation" under IC 34-6-2-86.

128. The IFA is an independent public instrumentality, a "municipal corporation," and a "body corporate and politic." *See* IC 4-4-11-4(a); *see also* IC 34-6-2-86.

129. As set forth at IC 4-4-11-4, which governs the creation by the State and the membership of the IFA:

> [t]here is created for the public purposes set forth in section 2.5 of this chapter **<u>a body politic and corporate</u>**, not a state agency but an <u>independent instrumentality exercising essential public functions</u>, to be known as the Indiana finance authority. The authority is separate and apart from the state in its corporate and sovereign capacity, and though separate from the state, the <u>exercise by the authority of its powers constitutes an essential governmental, public, and corporate function</u>. [IC 4-4-11-4(a)(*emphasis supplied*).]

130. The IFA is a "municipal corporation" under the Public Lawsuit Statute. IC 34-

6-2-86(1)(b).

131. The Indiana Supreme Court has stated that "[n]o other particular form of words is necessary to constitute a municipal corporation." *See Joint County Park Bd. v. Stegemoller,* 88 N.E.2d 686, 690 (1949). However, in this case, the General Assembly clearly indicated its intention to create a corporate body. *See Archer v. City of Indianapolis,* 122 N.E.2d 607, 645 n.2 (1954)(noting the General Assembly's long established practice of designating municipal corporations by name, including the toll-bridge commission ("there is hereby created a body corporate under the name of Indiana state toll-bridge commission") and the toll road (the toll road commission "is a body both corporate and politic.")(*quoting* IC § 36-3203, Burns' 1949 Replacement, 1953 Supp.)).

132. The Indiana Supreme Court has held that many types of entities were valid municipal corporations. *See, e.g., Lawson v. South Bend Pub. Transport. Corp.,* 270 N.E.2d 746 (1971) (South Bend Transportation Corporation was valid municipal corporation); *Datisman v. Gary Pub. Library,* 170 N.E.2d 55 (1960) (holding that Library Law of 1947 allowed creation of special library boards as municipal corporations); *Bailey v. Evansville-Vanderburgh Airport Auth. Dist.,* 166 N.E.2d 520 (1960) (upholding airport authority as valid municipal corporation); *Book v. State Office Bldg. Comm'n,* 149 N.E.2d 273 (1958) (holding that State Office Building Act validly created municipal corporation called State Office Building Commission); *Ind. State Toll-Bridge Comm'n v. Minor*, 139 N.E.2d 445 (1957) (holding that Indiana State Toll-Bridge Commission was valid municipal corporation); *Becker v. Albion-Jefferson Sch. Corp.,* 132 N.E.2d 269 (1956).

133. What Plaintiffs refer to as examples of entities falling within the definition are precisely that -- non-limiting examples; there is no exclusive list.

134. In addition, Plaintiffs' argument that "not one of the more than five dozen cases decided under the public lawsuit statute involves a State public improvement or Statewide agency" is made without citation to legal authority and proves nothing if true.

135. The IFA, again, is not a state agency. It is a body politic and corporate and was created precisely to undertake many of the same tasks that cities and towns often undertake, such as issuing bonds for public works projects.

136. In addition, at least five times, the Public Lawsuit statute has been used to challenge actions of the State Board of Tax Commissioners (now the Department of Local Government Finance). *Graber v. State Bd. of Tax Com'rs*, 727 N.E.2d 802 (Ind. Tax Ct. 2000); *Boshart v. State Bd. of Tax Com'rs*, 672 N.E.2d 499 (Ind. Tax Ct. 1996).

137. **Second**, the Indiana East/West Toll Road, a publicly owned toll road, is a "public improvement." IC 34-6-2-124(a).

138. The "public improvement" at issue in this lawsuit is, for example, more in the nature of "the establishment of a composting facility," which was held to be a "public improvement," than in the nature of "awarding of a three-year contract for trash services," which was not. *See Fuller v. Vevay*, 713 N.E.2d 318, 320-21 (Ind. Ct. App. 1999).

139. **Finally**, Plaintiffs explicitly urge this Court to declare invalid and to enjoin the construction, financing, or leasing of a public improvement by a municipal corporation. (*See* Compl.)

140. As a consequence, this lawsuit falls squarely within the parameters of the Public Lawsuit Statute, which, again, applies to any lawsuit that questions the validity, location, wisdom, feasibility, extent, and character of construction, financing, and leasing of a public improvement by a municipal corporation. IC 34-6-2-124(a); IC 34-6-2-86; IC 34-13-5-

1, *et seq*.

141. Plaintiffs' argument that the word "lease" can be read in only one direction -- *i.e.*, that "leasing" refers only to leases where the municipal corporation is the lessee and not the lessor -- is without merit.

142. Nothing in the statute so limits the word "leasing."

143. In addition, at least one Indiana action has been deemed a "Public Lawsuit" wherein the municipal corporation was the lessor. *See Huber v. Franklin County Comty. Sch. Corp. Bd. of Trustees*, 507 N.E.2d 233 (1987).

144. In *Huber*, "[t]he board [had] approved the creation of a separate municipal building corporation which would lease and maintain the new school after the school board constructed it." 507 N.E.2d, at 234. The Supreme Court held that "there is no dispute that [the plaintiff's] action was also a public lawsuit. Her complaint attacks numerous aspects of the school's construction, financing and ***leasing***, and thus falls squarely within [the Public Lawsuit Statute]." *Id.* at 236 (*emphasis supplied*).

145. Further, the plain language of the Public Lawsuit Statute contemplates a lessor as a municipal corporation when it refers to "a corporate or other entity that leases a public improvement <u>to</u> a municipal corporation" in IC § 36-13-5(2) (*emphasis added).*

146. Based on all of the foregoing, this lawsuit is a "Public Lawsuit," and this Court shall certify it as such.

147. This "Public Lawsuit" must be brought in conformity with and governed by the Public Lawsuit Statute. *See* IC 34-13-5-1 ("All [P]ublic [L]awsuits shall be brought solely in conformity with and governed by the provisions of [IC 34-13-5].").

148. Plaintiffs argue that parts of their lawsuit such as the claims relating to the

disposition of funds and tax exemptions do not fall within the Public Lawsuit Statute under any reading of the statute. In making this argument, Plaintiffs have specifically referred to Counts I, II, and III of their complaint as examples. Plaintiffs maintain that, at the very least, they should not be required to post a bond in order to proceed with these counts.

149. The Court of Appeals in *Erwin R. Evens and Sons, Inc. v. Board of the Indianapolis Airport Authority,* 584 N.E.2d 576, 582 n.4 (Ind. App. 4th Dist. 1992), held that an entire suit can be treated as a Public Lawsuit where it "is incapable of separate, private and public treatment." (Citing *Pepinsky v. Monroe County Council,* 461 N.E.2d 128 (Ind. 1984) and *Gariup v. Stern,* 254 Ind.563, 261 N.E.2d 578 (1970)). In *Gariup,* the Supreme Court approved combined treatment because "The causes were commingled in each pleading paragraph and as such were not susceptible of separate treatment by the trial court." 261 N.E.2d at 567.

150. The claims contained in the various counts of Plaintiffs' Complaint are not severable, such that, the Public Lawsuit Statute can apply to some of them and not others, except for Counts IV relating to the I-69 protections and Count VIII, which can proceed without regard to the Public Lawsuit Statute.

151. The claims in Count I, II, III, IV (relating to the creation of local construction funds and the transfer of the operation of the Toll Road), V, VI and VII of the Plaintiffs' Complaint involve claims in which the "validity" of "financing or leasing" of the Indiana Toll Road, which is a public improvement, is questioned "directly or indirectly" and therefore fall squarely within the definition of "Public Lawsuit". Indiana Code §34-6-2-24(a)(1). The Court also concludes that the Counts VI claim is moot and the Plaintiffs have no standing to make the claim contained in Count VII, which will be further explained hereinafter.

152. The Toll Road Lease is put in jeopardy by every portion of Plaintiffs' lawsuit except for Counts IV (relating to the I-69 provisions) and VIII and therefore the entire lawsuit except for those counts belongs within the umbrella of the Public Lawsuit process. Section 2.4(a) of the Lease allows the Concessionaire to avoid closing if the IFA cannot satisfy certain conditions. One of those conditions, set forth in Section 9.1(g) of the Lease is that there must be no lawsuit pending that would have a material adverse affect on the validity or enforcement of the Lease. All of the Plaintiffs' claims, except for the aforementioned Counts, potentially have a material adverse affect on the validity or enforcement of the Lease.

153. The Counts of the Plaintiffs' complaint that challenge the constitutionality of both the Lease and the Act (Counts II, III, and V) are clearly within the public lawsuit statute because they directly challenge provisions of the Lease and provisions of the Act upon which the Lease is based.

154. As to the Counts of the complaint that challenge the constitutionality of the Act alone (Counts I, IV, VII and VIII), the question is whether those challenges directly or indirectly question the validity of the Lease, or to state it another way, whether those challenges to the Act are so intertwined with the validity of the Lease as to be inseparable.

155. Counts I, IV (challenging the establishment of local construction funds and the transfer of the operation of the Toll Road) and VII challenge provisions of the Act, that if successful, would likely result in those provisions being declared non-severable from the rest of the Act under Indiana Code §1-1-1-8(b)(1) and (2) which state:

> (b) Except in the case of a statute containing a nonseverability provision, each part and application of every statute is severable. If any provision or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless:
>
> (1) The remainder is so essentially and inseparably connected with, and so dependent upon, the invalid provision or application

> that it cannot be presumed that the remainder would have been enacted without the invalid provision or application; or
>
> (2) The remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision or application.
>
> This subsection applies to every statute, regardless of whether enacted before or after the passage of this subsection. [IC 1-1-1-8(b)(1) and (2)]

156. The provisions of the Act that direct the proceeds from the Lease into various highway construction funds (Count I), and local construction funds (Count IV) are all an integral part of the Act. A principal reason for the Act's authorization of public-private partnerships and public-private agreements, including, particularly, the Toll Road Lease, that is validated by those provisions, is to generate money to place into the various funds authorized by HEA 1008, i.e. "Major Moves Construction Fund", "Next Generation Trust Fund" and "Local Major Moves Construction Funds" all for the purpose of funding future road, highway and bridge projects in Indiana. If the provisions of the Act that allow for the distribution of the proceeds of the Toll Road Lease are invalid, then a major purpose of the Act and the Toll Road Lease is thwarted. The Court concludes that the Legislature would not have enacted HEA 1008 without those provisions. Additionally, without those provisions, the remainder of the Act is incomplete and incapable of being executed in accordance with the Legislative intent.

157. In Count VIII the Plaintiffs challenge the Executive Branch's power to decide what roads will become toll roads and claim that such provisions in HEA 1008 violate Article 3 §1 of the Indiana Constitution. Even if found to be unconstitutional, these provisions are clearly severable from the remainder of HEA 1008 for the following reasons:

a. These provisions have nothing at all to do with the overall purpose or

scheme of the Act. They are neither essential or inseparably connected to the rest of the Act.

b. The remainder of the Act is not in the least dependent upon whether the Executive Branch or the Legislative Branch designates existing highways as toll roads. Therefore, the Court concludes that absent these provisions, the remainder of the Act would have been enacted by the Legislature. Who ultimately designates highways as tolls roads has little to do with the overall legislative intent of the Act.

158. Count VIII is also not a part of the Public Lawsuit for the following reasons:

a. The provisions of the Act that give the Executive Branch the power to designate a highway as a toll road have nothing to do with the operation of the Indiana Toll Road. The attack upon those provisions does not in any way jeopardize the validity or enforcement of the Lease; therefore, Plaintiffs' separation of powers challenge to the Act does not come within the terms of Section 9(g) of the Lease regarding pending litigation. Any attempt by the ITR to treat it as such would be at its financial and legal peril.

b. The Lease is for the Indiana Toll Road, which obviously already exists and has existed for over fifty (50) years, therefore, the separation of powers challenge does not question, directly or indirectly, the "validity, location, wisdom, feasibility, extent, or character" of "financing or leasing" of the Indiana Toll Road, which is the public improvement that is the subject of this case. Therefore, this claim is not part of the Plaintiffs' Public Lawsuit and may proceed without bond.

159. The Court concludes that Plaintiffs lack standing to challenge the statute of limitations provision of HEA 1008 and Plaintiffs' claim that the ITR and SMP are not authorized to do business in Indiana is moot and fails to present a justiciable issue to be decided.

160. The provisions of the Act challenged in Counts I, II, III, IV (as to the establishment of local constructions funds and the transfer of highway operations only) and Count V, if invalid, will likely result in the entire Act being declared invalid. If the Act is invalid, the Lease is invalid or void.

161. Count IV of Plaintiffs' complaint also attacks the provisions of the Act that prohibit construction of I-69 through Perry Township and limit the designation of the Indianapolis to Martinsville leg of the I-69 extension as a toll road. Even if found to be unconstitutional special legislation, these provisions are clearly severable from the remainder of HEA 1008 for the following reasons:

a. These provisions have nothing at all to do with the overall purpose or scheme of the Act. They are neither essential or inseparably connected to the rest of the Act.

b. The remainder of the Act is not in the least dependent upon the I-69 provisions. Therefore, the Court concludes that absent these provisions, the remainder of the Act would have been enacted by the Legislature. The I-69 provisions have nothing to do with the overall legislative intent of the Act.

162. The portion of Count IV that attacks the I-69 provisions of HEA 1008 is also not a part of the Public Lawsuit for the following reasons:

a. The I-69 provisions of the Act have nothing to do with the operation of the Indiana Toll Road. The attack on those provisions does not in any way jeopardize the validity or enforcement of the Lease; therefore, Plaintiffs' challenge to the I-69 provisions of the Act does not come within the terms of Section 9(g) of the Lease regarding pending litigation. Any attempt by the ITR to treat it as such would be at its financial and legal peril.

b. The I-69 provisions of the Act do not question directly or indirectly the

"validity, location, wisdom, feasibility, extent, or character" of "financing or leasing" of the Indiana Toll Road, which is the public improvement that is the subject of this case. Therefore, this claim is not part of the Plaintiffs' public lawsuit and may proceed without bond.

C. Plaintiffs' Complaint Except for Counts IV (relating to the I-69 Provisions), and Count VIII, Must be Dismissed unless Plaintiffs Post a Bond with Surety to be Approved by the Court.

(1) The Surety Bond Provisions of the Public Lawsuit Statute.

163. When a court certifies that an action is a "Public Lawsuit," the defendant is permitted to "petition for an order of the court that the cause be dismissed unless the plaintiff posts a bond with surety to be approved by the court." IC 34-13-5-7(a).

164. The bond "must be payable to the defendant for the payment of all damages and costs that may accrue by reason of the filing of the lawsuit if the defendant prevails." IC 34-13-5-7(a).

165. The court must hold a hearing on a petition for a bond "in the same manner as the hearing on temporary injunctions," and

> [i]f, at the hearing, the court determines that the plaintiff cannot establish facts that would entitle the plaintiff to a temporary injunction, the court shall set the amount of bond to be filed by the plaintiff in an amount found by the judge to cover all damage and costs that may accrue to the defendants by reason of the pendency of the public lawsuit in the event the defendant prevails. [IC 34-13-5-7(b).]

166. The standard courts use in addressing bond petitions is that a bond shall be required "[i]f, at the hearing, the court determines that the plaintiff cannot establish facts that would entitle the plaintiff to a temporary injunction." IC 34-13-5-7(b).

167. A temporary restraining order may only be entered in the most dire of

circumstances; *i.e.*, a temporary restraining order may only be entered if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." T.R. 65(B).

168. A party requesting a temporary restraining order must demonstrate: (A) the movant has at least a reasonable likelihood of success at trial by establishing a prima facie case; (B) the movant's remedies at law are inadequate causing irreparable harm; (C) the threatened injury to the movant outweighs the potential harm the grant of the injunction would occasion on the non-movant; and (D) the public interest would not be disserved. *McGlothen v. Heritage Environ. Servs., LLC*, 705 N.E.2d 1069, 1074 (Ind. Ct. App. 1999); *Norland v. Faust*, 675 N.E.2d 1142, at 1074 (Ind. Ct. App. 1997), *opinion clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997), *trans. denied*. In short, the plaintiff must be likely to succeed, there must be a true emergency and the harm must be irreparable.

169. When a plaintiff in a public lawsuit does not seek temporary injunctive relief, case law under the Public Lawsuit Statute has focused on the first requirement, requiring a bond to be posted in a "Public Lawsuit" where the plaintiff cannot show that "[t]he question to be tried is a substantial one, proper for investigation by a court of equity." *Bell v. State Bd. of Tax Comm'rs*, 651 N.E.2d 816, 821 (Ind. Tax Ct. 1995); *see also Boaz v. Bartholomew Consol. Sch. Corp.*, 654 N.E.2d 320, 322-23 (Ind. Tax Ct. 1995); *Hughes v. City of Gary*, 741 N.E.2d 1168, 1175 (Ind. 2001).

170. Thus, Plaintiffs' burden is not one of "probable cause"; rather, Plaintiffs must demonstrate, at minimum, a *substantial* issue to be tried, *i.e.*, a likelihood of success to succeed on the merits of their claims.

171. That Plaintiffs have filed the Complaint alleging constitutional violations does not satisfy their burden here -- if that were the case, then every Public Lawsuit alleging a constitutional violation would go forward without a bond posting requirement.

172. Rather, a plaintiff's burden to "introduce evidence sufficient to show the trial court that there is a substantial question to be tried accomplishes those purposes [*noted supra*] adequately by eliminating merely harassing suits or completely non-meritorious litigation." *Bell*, 651 N.E.2d at 821 (*quoting Johnson v. Tipton Cmty. Sch. Corp.*, 255 N.E. 2d 92, 94 (1970)).

173. Courts must impose the surety bond requirement where Plaintiffs fail to meet their burden.

174. For example, in *Hughes v. City of Gary*, 741 N.E.2d 1168, 1174 (2001), the Indiana Supreme Court affirmed "the trial court's order requiring the Plaintiffs to post bond, and its subsequent order dismissing the action with prejudice." In *Hughes*, a $47 Million public improvement was challenged by two members of a city council, and the trial court had ordered the Plaintiffs to post a surety bond in the amount of $2.35 Million. The trial court subsequently dismissed the action when the members failed to post bond.

175. Also, in *Bell*, once the court found that there was no substantial question to be tried, it set the amount of the bond to be posted based on the defendant's expert witnesses' testimony that the defendant could "expect to incur additional costs in the amount of $1,099,071 if construction of the new middle school is delayed pending the outcome of this lawsuit ... [where t]he [plaintiffs] presented no evidence contesting th[ose] estimates." 651 N.E.2d at 823. Based on that evidence, the court held "that should [the defendant] prevail in this lawsuit, damages and costs may accrue to it in the total amount of $1,099,071." *Id.*

176. In addition, in *Boaz*, the court ordered the Plaintiffs to post a bond in the amount of $4,330,000.00, stating that if the bond was "not so filed, this suit shall be dismissed pursuant to [the Public Lawsuit Statute]." 654 N.E.2d at 327.

177. After a court orders a surety bond, "[i]f the plaintiff does not file a bond with sureties approved by the court within ten (10) days after the order to do so is entered, the suit shall be dismissed." IC 34-13-5-7(c).

178. As set forth below, Plaintiffs must file a bond in the amount of, at least, $1.9 Billion, with sureties approved by this Court within ten (10) days after the entry of this Order or this suit must be dismissed with prejudice.

(2) Plaintiffs Have Not Demonstrated A Reasonable Likelihood of Success at Trial.

179. Plaintiffs request that this Court declare that HEA 1008 and the Lease are void because they allegedly "violate multiple provisions of the Indiana Constitution." (Compl. at p. 1.)

180. Plaintiffs failed to establish that they have at least a reasonable likelihood of success at trial on any of their claims.

181. Many of Plaintiffs' claims fail because of three fatally defective errors: Plaintiffs contend that (1) the IFA and the State are one in the same, (2) there is "public debt" and (3) the Toll Road is being sold, not leased. All three contentions are demonstrably false, and to hold otherwise would require this Court to ignore decades of Supreme Court precedent.

182. Although an independent instrumentality of the State, the IFA is *not* the State *qua* State.

183. The Indiana Code is unambiguous on this point:

> There is created for the public purposes set forth in section 2.5 of this chapter *a body politic and corporate, not a state agency but an*

> *independent instrumentality* exercising essential public functions, to be known as the Indiana finance authority. The authority is *separate and apart from the state in its corporate and sovereign capacity*, and though separate from the state, the exercise by the authority of its powers constitutes an essential governmental, public, and corporate function. [IC 4-4-11-4 (*emphasis supplied*).]

184. Although they are independent instrumentalities of the State, the Supreme Court has routinely held that bodies corporate and politic are *not* the State in its corporate sovereign capacity.

185. In *Ennis v. State Highway Commission*, for example, the Supreme Court distinguished between the State and the Indiana Toll Road Commission (the precursor to the IFA), and held that the Commission was a body politic and corporate separate and apart from the State whose debt did not encumber the State. *Ennis*, 108 N.E.2d 687, 694 (1952).

186. The IFA is merely the latest iteration of the Toll Road Commission, for it has the power to "construct, reconstruct, maintain, repair, and operate" toll roads. IC 8-15-2-1, as amended by HEA 1008 § 8.[3]

187. The Supreme Court has made this same distinction numerous times with respect to a variety of entities, many (if not all) of which were created by laws containing virtually identical provisions as the law that created the IFA. *See, e.g., Steup v. Ind. Hous. Fin. Auth.*, 402 N.E.2d 1215, 1218-19 (1980); *Orbison v. Welsh*, 179 N.E.2d 727, 737-38 (1962); *Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273, 281-82 (1958); *Ind. State Toll-Bridge Comm'n v. Minor*, 139 N.E.2d 445, 449 (1957).

[3] The original entity, and the entity at issue in *Ennis*, was the Indiana Toll Road Commission, which was established in 1951. *See* Acts 1951, Chap. 281, § 3. In 1980, the Toll Road Commission was abolished, and its powers, duties and liabilities transferred. Acts 1980, P.L. 74, Secs. 10 through 16. In 1983, the Indiana Toll Finance Authority was established. P.L. 109-1983, SEC. 3. In 1988, the Indiana Toll Finance Authority became the Indiana Transportation Finance Authority. P.L. 68-1988, SEC. 5. In 2005, the Indiana Transportation Finance Authority became the Indiana Finance Authority. P.L.235-2006, SECS. 106, 116, 117 and 121.

188. This body of case law is the foundation of Indiana's public finance system. Without it, Indiana's ability to finance the construction and improvement of highways, bridges, state offices, prisons and other public projects and programs that citizens take for granted would be destroyed.

189. Plaintiffs' allegations that the obligations of the IFA are obligations of the State are misplaced. It is unconstitutional for the State to issue debt except in certain limited emergency circumstances specified by Article 10, Section 5 of the Indiana Constitution.[4]

190. In accordance with this constitutional limitation, the General Assembly has created a variety of independent instrumentalities, one of which is the IFA, for the purpose (among others) of issuing debt instruments, primarily bonds. The funds generated by these bonds are used to build office buildings, prisons, state park lodges, state mental health hospitals, state museums, state police forensic labs, and highways to be leased to the State; to fund housing programs; to aid local government through the Indiana Bond Bank; and to accomplish other important public purposes such as funding State parks and facilitating the development of environmentally compliant water and sewer systems across the State.

191. Because the entities that issue these bonds are "separate and apart from the state in its corporate and sovereign capacity," the Indiana Supreme Court has repeatedly held that their debt is not the State's debt. *See id.*

192. The Lease is not a sale. Plaintiffs have asked this Court to ignore the plain and unambiguous language contained in the Lease and treat the Lease as a sale.

193. As a matter of law, plain and unambiguous language contained in a contract

[4] "No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense."

controls both the parties and the Court. *See H & G Ortho, Inc. v. Neodontics Int'l Inc.*, 823 N.E.2d 718, 726 (Ind. Ct. App. 2005).

194. Plaintiffs already admitted that the Lease is plain and unambiguous. Thus, the Lease is controlling.

195. It is undisputed that the Lease does not transfer any ownership or title over the Toll Road to the Concessionaire. Indeed, HEA 1008 expressly forbids such a transfer. The Lease cannot be contradicted by parol evidence or by some alternative interpretation. The Lease language controls and is dispositive on all issues.

(a) Plaintiffs Failed to Demonstrate a Likelihood of Success as to Count I because the Public Debt and Common School Fund Provisions of the Indiana Constitution have No Application to this Case.

196. Count I of the Complaint alleges HEA 1008 effects an unconstitutional disposition of funds, in violation of Article 10, Section 2 (the "Public Debt provision") and Article 8, Section 2 (the "Common School Fund provision") of the Indiana Constitution.[5] Neither provision applies here.

197. Plaintiffs failed to establish any of the criteria necessary to prevail on their claim under the Public Debt provision of the Indiana Constitution.

198. Article 10, Section 2 provides:

> All the revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof, and any surplus that may, at any time, remain in the Treasury, derived from taxation for general State purposes, after the payment of the ordinary expenses of the government, and of the interest on bonds of the State, other than Bank bonds; shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.

[5] Plaintiffs also include a Privileges and Immunities claim in Count I, as they do in several of their other Counts. These claims will be discussed collectively below.

199. For this provision to apply, at least three conditions must be satisfied:

1. The State must have a "Public Debt"; **and**

2. The Toll Road must be a public work "belonging to the State"; **and**

3. The State must receive revenue from

a. the "sale" of the Toll Road, or

b. "net annual income" from the Toll Road.[6]

200. Plaintiffs failed to demonstrate any of the three elements.

(i) The State has no Public Debt.

201. Without a "Public Debt," Article 10, Section 2 does not restrict how the General Assembly may appropriate income derived from the Toll Road lease.

202. As discussed above, although certain of Indiana's municipal corporations, as that term is used in Article 15, Section 1 of the Indiana Constitution, have debt, the State itself does not. *See American Nat'l. Bank and Trust Co. v. Ind. Dep't. of Highways*, 439 N.E.2d 1129 (1982)(*citing Steup*, 402 N.E.2d 1215; *Orbison*, 179 N.E.2d 727; *Book*, 149 N.E.2d 273); *Ennis*, 108 N.E.2d 687).

203. Section 2 fulfilled its purpose long ago, as the constitutional delegates of 1850 hoped it would, and all then existing "public debt" has been paid in full. No more "public debt" has been created, as it is forbidden by Article 10, Section 5 of the Indiana Constitution.

204. Accordingly, even if the State were selling the Toll Road — and it is not — and even if the State were to derive net annual income from the Toll Road deal — and it will not — Section 2 cannot circumscribe the General Assembly's power to appropriate money

[6] The Indiana Supreme Court apparently relates "thereof" to the "net annual income" of the "public work." *See Orbison v. Welsh*, 242 Ind. 385, 419 (Ind. 1962)("It will be noted that Art. 10, § 2 of the Indiana Constitution for our purposes here only refers to '* * * the net annual income * * *' of the public works belonging to the state.")

derived from public works *now*. The General Assembly cannot pay a debt that does not exist.[7]

205. Plaintiffs attempt to argue that "Public Debt" as used in Article 10, Section 2 includes city and local debt. Plaintiffs purported evidence on this point was presented by non-party witness Mr. Lewandowski, who testified that the City of New Haven has revenue bonds. Mr. Lewandowski testified, however, that the City owed no general obligation debt. In fact, the "debt" described by Mr. Lewandowski is structured in the same manner that the Supreme Court has repeatedly held not to constitute "public debt." (*See* cases discussed *infra*.)

206. Further, Article 10, entitled "Finance," is separate and apart from Article 13, entitled "Municipal Debt." The "public debt" referred to in Article 10, Section 2 refers to State debt, not municipal debt, which is addressed in Article 13.

207. As noted earlier, the unfunded actuarial liability of the Teachers Retirement Fund does not constitute “debt,” as that term is used in our Constitution.

208. "Public Debt" refers to State debt, and there is no State debt.

(ii) The Toll Road does not "belong[ ] to the State."

209. The IFA, by statute, has the power to control and operate nearly every aspect of the Indiana Toll Road. *See* IC 8-15-2-1, as amended by HEA 1008 § 8; IC 8-15-2-5, as amended by HEA 1008 § 9.

210. This includes the power to construct, reconstruct, maintain, repair, and police toll road property, and to do all that is "necessary or proper" to carry out these activities. *See id.* As discussed earlier, the IFA is separate and distinct from the State.

[7] Again, Article 10, Section 5 does allow the State to incur debt in certain exigent circumstances (for example, to put down an insurrection), but Plaintiffs are not claiming that the State has any "exigent debt" to be paid off.

211. When the IFA purchases toll road property, which it is also empowered to do, it must "take title thereto in the name of the state[.]" IC § 8-15-2-5(5), *as amended by* HEA 1008 § 9; *accord* IC 8-15-2-7(1).

212. But, the IFA actually owns the Toll Road by statute. IC § 8-9. 5-8; IC § 8-14.5-5; IC § 8-15-2-5(5), *as amended by* HEA 1008 § 9; IC § 8-15-2-7(1); IC § 8-15-2-8; IC § 8-15-2-9.

213. Moreover, as was shown at the Hearing, the Trust Indenture dated as of September 1, 1985, as supplemented from time to time, which was entered into and is binding on the IFA and secures it bondholders, and was drafted without relation to this litigation, provides that the IFA owns the Toll Road.

214. Again, as practical matter, the Toll Road does not "belong[ ]" to the State, but to the IFA. As the Supreme Court noted in *Book*:

> Within the limits necessary for the preservation of our form of federal and state governments and the basic principles upon which they rest, the Constitutions of both state and nation must be construed to the end that public progress and development will not be stifled and that public problems, with their ever increasing complexity, may be met and solved to the best interests of the public generally. [149 N.E.2d at 281 (*quoted source omitted*).]

215. Construing the phrase "belonging to the State" to require practical day-to-day control furthers public progress, in that it allows the General Assembly to do what it has done with Major Moves: to creatively establish a constitutional method for raising the capital necessary to build what the IFA has described as a much-needed and publicly-desired twenty-first century highway system.

(iii) The State is not "selling" the Toll Road.

216. The final requirement of Section 2 — that a "sale" of the Toll Road occur, or that "net annual income" be derived from the public work — cannot be satisfied.

217. HEA 1008 calls for a lease of the Toll Road, and that is exactly what the "Concession and *Lease* Agreement" reflects; the Lease is not a "sale."

218. Furthermore, the State is not receiving "net annual income" under the Lease. The Concessionaire will be paying its $3.8 billion rental payment to the IFA, not the State.

219. The Toll Road will be leased, not sold; by law, it cannot be sold.

220. Under HEA 1008, the IFA is authorized to enter into a "public-private agreement" with respect to the Toll Road. HEA 1008 § 39.

221. A "public-private agreement" is an agreement between a private entity and the IFA under which the private entity, "acting on behalf of [the IFA] *as lessee, licensee, or franchisee*," manages the Toll Road. *Id.* (Chapter 2, § 8; emphasis added).

222. Any public-private agreement entered into by the IFA "must" provide for a "lease, franchise, or license" of the Toll Road. *Id.* (Chapter 5, § 2(2)).

223. The original term of the public-private agreement cannot exceed 75 years; that is, the agreement may not provide for a permanent transfer of the Toll Road to the private entity. *Id.* (Chapter 5, § 2(1)).

224. Under no conditions may the IFA "sell, convey, or mortgage a toll road project." HEA 1008 § 10.

225. The Lease is consistent with these provisions. The key section provides (with emphasis):

> Section 2.1. Grant of Lease. Upon the terms and subject to the conditions of this Agreement, effective at the Time of Closing, (a) the Concessionaire shall pay the IFA the exact amount of $3,800,000,000.00 in cash (the "**Rent**") and (b) the IFA shall (i) demise and **lease** the Toll Road Land and the Toll Road Facilities to the Concessionaire free and clear of Encumbrances other than Permitted IFA Encumbrances for and during the term (the "Term") commencing on the Closing Date and expiring on the **seventy-fifth (75th)**

> **anniversary** of the Closing Date (or such later date as required pursuant to the terms of this Agreement in connection with the occurrence of any Delay Events), unless terminated earlier as herein provided, (ii) grant the Concessionaire an exclusive franchise and license for and during the Term to provide Toll Road Services, and in connection therewith to operate, manage, maintain, rehabilitate and toll the Toll Road for Highway Purposes and otherwise in accordance with and pursuant to this Agreement, and (iii) assign, transfer and otherwise convey to the Concessionaire or cause the relevant State agency to assign, transfer, and otherwise convey to the Concessionaire each of the Toll Road Assets and Assigned Toll Road Contracts, and the Concessionaire shall accept each such demise, lease, grant, assignment, transfer and conveyance (collectively, the "Transaction"). [Lease at § 2.1 (*bold emphasis supplied*).]

226. To summarize: (1) the Lease provides for a transfer of possession (*i.e.*, a private company will be operating the IFA's facility), not ownership, to the Concessionaire; (2) in return for operating the IFA's facility, the Concessionaire must remit "Rent" to the IFA; and, then, (3) operation of the IFA's facility reverts to the IFA after a specified term (75 years).

227. The Lease has all of the hallmarks of a true lease agreement.

228. The plain meaning of "lease" is a contract by which one conveys the right to use real estate, equipment, or facilities for a specified term and for a specified rent. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

229. In contrast, the plain meaning of "sale" is the transfer of ownership and title to property for a price. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

230. It is the difference between a temporary transfer of possession (a lease) and a permanent transfer of ownership (a sale); the two transactions are very different. All Plaintiffs who testified conceded this unassailable point.

231. Plaintiffs argue that the Toll Road transaction is a "sale" because the Lease

treats it as such for federal and state income tax purposes.[8]

232. A complete explanation of why the Lease may be treated as a sale for tax purposes is a complicated proposition, one beyond the scope of these Findings and Conclusions. Suffice it to say, it is not uncommon that one kind of transaction may be treated one way for general legal purposes and still another way for specific tax purposes, and that contrary treatment by the tax law does not alter the legal form.

233. It is well settled, however, that a transaction can be treated differently for tax purposes than for state law or "corporate" purposes. *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978).

234. Perhaps the quintessential example of such treatment is the treatment of "disregarded entities." Under the Internal Revenue Code, the existence of a single member limited liability company is completely ignored for tax purposes (Treas. Reg. § 301.7701-2) and its income, expenses, gains and losses are treated as having been earned directly by its owners. However, for corporate law purposes, a single member LLC is treated as an entity that is separate and distinct from its owners. *See, e.g.*, IC 23-18-2-1, *et seq*. (regarding organization and powers of Indiana LLCs). Likewise, a "qualified S corporation subsidiary" is a separate and distinct entity for corporate law purposes but is a disregarded entity for tax purposes. I.R.C. § 1361(b)(3)(A). Under IRC Section 1259, an arrangement that is treated

[8] Section 2.8 of the Lease provides:

> **Intended Treatment for Federal and State Income Tax Purposes.** This Agreement is intended for U.S. federal and state income tax purposes to be a sale of the Toll Road Facilities and Toll Road Assets to the Concessionaire and the grant to the Concessionaire of an exclusive franchise and license for and during the Term to provide Toll Road Services within the meaning of sections 197(d)(1)(D) and (E) of the Internal Revenue Code of 1986, as amended, and sections 1.197-2(b)(8) and (10) of the Income Tax Regulations thereunder.

simply as an option to acquire property for corporate law purposes is treated as a sale for tax purposes. I.R.C. § 1259(c). Similarly, under IRC Section 338, a transaction that is treated as a sale of stock for corporate law purposes is treated as a sale of assets for tax purposes. I.R.C. § 338. There are other examples of situations in which a transaction is treated differently for tax purposes than for corporate law purposes, as well. *See, e.g.*, Treas. Reg. § 1.1031(a)-1(c) (30-year lease treated as a sale or exchange for purposes of like kind exchange provisions of the Internal Revenue Code); Priv. Ltr. Rul. 9539018 (Sep. 29, 1995) (acquisition of target through successive state law mergers treated as single statutory merger for federal income tax purposes); *see also* I.R.C. §§ 197(d)(1)(D) and (E),[9] and Income Tax Regulations thereunder, §§ 1.197-2(b)(8) and (10), which Code and Regulation sections are cited at Section 2.8 of the Lease.

235. The dual nature and treatment of each of these circumstances is recognized for purposes of both Indiana corporate and Indiana tax law. It can be said with certainty, however, that whatever may be the definition of "sale" under the federal and state tax codes, that definition has nothing to do with the meaning of that same word under the Indiana Constitution.

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[9] As to amortization of goodwill and certain other intangibles, Title 26, §§ 197(d)(1)(D) and (E) provide:

> (d) Section 197 intangible
>
> For purposes of this section—
>
> (1) In general
>
> Except as otherwise provided in this section, the term “section 197 intangible” means— ...
>
> (D) any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof,
>
> (E) any covenant not to compete (or other arrangement to the extent such arrangement has substantially the same effect as a covenant not to compete) entered into in connection with an acquisition (directly or indirectly) of an interest in a trade or business or substantial portion thereof... [Title 26, §§ 197(d)(1)(D) and (E).]

(iv) The State will not receive "net annual income" under the Lease.

236. Under Section 2.1 of the Lease, the Concessionaire will be paying its $3.8 billion rental payment to the IFA. The IFA's finances are handled separately from the finances of the State.

237. All money received by the IFA must be deposited "in a separate account or accounts," IC 4-4-11-32; the IFA is required to prepare its own financial statements, IC 4-4-11-38; and, with limited exceptions, "all income and assets of the authority are for [the IFA's] own use without appropriation," IC 4-4-11-40.[10]

238. Just as the debts of the IFA cannot be considered the debts of the State, *see Orbison*, 179 N.E.2d at 737-38; *Book*, 149 N.E.2d at 287-89; *Ennis*, 108 N.E.2d at 698-99[11], given the separateness of the two, so too the income of the IFA cannot be considered the income of the State, demonstrating once again that Article 10, Section 2 does not apply.

(v) Plaintiffs Failed to Establish any of the Criteria Necessary to Prevail on their Claim under the Common School Fund provision of the Indiana Constitution.

239. Article 8, Section 2 of the Indiana Constitution provides in relevant part: "The Common School fund shall consist of ...All lands that have been, or may hereafter be, granted

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[10] Similarly, Indiana Code Section 4-4-11-15(46), as amended by P.L. 235-2005 § 19, states that the Authority has the power to "[a]cquire, hold, use, and dispose of the authority's income, revenues, funds, and money." However, there is another version of this same Code section, which was amended by P.L.232-2005 § 3 and does not contain this language. It is unclear which version is current law.

[11] *See also* Indiana Code Section 4-4-11-22, which provides:

> No bonds issued by the authority under this chapter shall constitute a debt, liability, or obligation of the state, or a pledge of the faith and credit of the state, but shall be payable solely as provided by section 21 of this chapter. Each bond issued under this chapter shall contain on its face a statement that neither the faith and credit nor the taxing power of the state is pledged to the payment of the principal of or the interest on the bond.

to the State, where no special purpose is expressed in the grant, and the proceeds of the sales thereof ... ."

240. Separated into its constituent parts, Plaintiffs were required to satisfy three conditions to prevail under this provision:

1. The land on which the Toll Road sits must have been granted to the State; **and**

2. The grant(s) must have expressed no special purpose; **and**

3. The Toll Road land must be sold.

241. As with their Public Debt claim, Plaintiffs failed to show that any of these conditions are satisfied.

242. **First**, the Toll Road land was not granted to the State. Rather than being granted to the State, certain local attorneys and officers were hired to acquire the land for the Toll Road for the use of the Commission (now IFA), either through eminent domain proceedings (the minority) or through voluntary acquisition from individual landowners (the majority).[12]

243. **Second**, the parcels of property that make up the Toll Road were dedicated for the "special purpose" of containing the right-of-way of the Indiana East/West Toll Road.

244. **Third**, as explained earlier, the Toll Road is not being sold; the IFA could not sell the Toll Road even if it wanted to. *See* HEA 1008 § 10. The IFA plans to lease the Toll Road.

[12] *See also* Acts 1951, chapter 281, SEC. 7 ("The commission is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, any land, property, rights, rights-of-way, franchises, easements, and other interests in lands as it may deem necessary or convenient for the construction and operation of any toll road project upon such terms as and at such price as may be considered by it to be reasonable and can be agreed upon between the commission and the owner thereof, and to take title thereto in the name of the state.").

245. Accordingly, Plaintiffs have not established that they are likely to succeed on the merits of Count I of the Complaint. As noted hereinabove, Count I, at the very least, indirectly questions the validity of the Toll Road Lease and therefore comes within the definition of a Public Lawsuit.

(b) As to Count II, Plaintiffs Failed to Demonstrate a likelihood of success establishing that HEA 1008 Grants an Unlawful Tax Exemption; The Property Exempted Indisputably Falls within the "Municipal Purposes" Exception to Article 10, Section 1 of the Indiana Constitution.

246. As long as the IFA has owned the Toll Road, all Toll Road property has been exempted from property taxes under Indiana law. However, if tax-exempt property is leased to another whose property is not exempt, then the leasehold estate or the leased property itself must be assessed and taxed as if owned by the lessee. IC 6-1.1-10-37.

247. To reconcile those statutory provisions, the General Assembly added the following provision to Section 39 of HEA 1008:

> Chapter 8. Taxation of Operators
>
> Sec. 1. A toll road project and tangible personal property used exclusively in connection with a toll road project that are:
>
> (1) owned by the authority and leased, franchised, licensed, or otherwise conveyed to an operator; or
>
> (2) acquired, constructed, or otherwise provided by an operator in connection with the toll road project;
>
> under the terms of a public-private agreement are considered to be public property devoted to an essential public and governmental function and purpose and the property, and an operator's leasehold estate, franchise, license, and other interests in the property, are exempt from all ad valorem property taxes and special assessments levied against property by the state or any political subdivision of the state.

248. Plaintiffs claim that this provision violates Article 10, Section 1 of the Indiana Constitution, which provides in pertinent part:

> (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. The General Assembly may exempt from property taxation any property in any of the following classes:
>
> (1) Property being used for municipal . . . purposes.

249. Plaintiffs fail on this claim; for, the property exempted by HEA 1008 is used for "municipal purposes."

250. It is firmly established that "municipal purposes," as that term is used in Article 10, Section 1, is not limited to the narrow meaning implied by Plaintiffs' claim, *i.e.*, "of or pertaining to a local governmental unit."

251. Rather, "municipal purposes" is synonymous with "public" or "governmental" purposes, as distinguished from purposes that are purely private in nature. *See, e.g.*, *Steup*, 402 N.E.2d at 1227 (upholding the Indiana Housing Finance Authority Act against constitutional attack); *Orbison,* 179 N.E.2d at 739 (upholding Indiana Port Commission Act against constitutional attack).

252. The seminal case on this issue is *City of Louisville v. Babb*, 75 F.2d 162 (7th Cir. 1935).[13] In *Babb*, the City of Louisville constructed a toll bridge that terminated in Jeffersonville, Indiana. The Indiana legislature passed a law exempting toll bridge property from taxation, and an Indiana taxpayer sued, arguing the exemption violated Article 10, Section 1. The Seventh Circuit, in a thorough and well-reasoned opinion, rejected the claim:

> It is not reasonable to suppose that the word "municipal" was used in the Constitution of the state of Indiana in any narrow or restricted sense. Had it been intended to cover only property as would serve a "city" purpose, there would be no provision in the Constitution exempting the property of the state, county, or township from taxation. The reasonable meaning to be given to

[13] *See* Indiana Supreme Court opinions in *Steup* and *Orbison*, relying on *Babb*.

> the phrase "municipal purpose" when so used, is the broader meaning — . . . that of public or governmental purpose as distinguished from private. [*Id.* at 166 (*emphasis supplied*).]

Having determined that a "municipal purpose" means a "public or governmental purpose," the *Babb* court found the conclusion that a toll bridge serves such purposes "inescapable." *Id.*

253. The General Assembly expressly found that the Toll Road serves a public purpose. The very provision of HEA 1008 that Plaintiffs attack specifically states that the exemption is "for property devoted to an essential public and governmental function and purpose."

254. Courts historically have given such legislative findings great deference. *See, e.g.*, *Orbison*, 179 N.E.2d at 739.

255. As the court in *Babb* put it, "the question of fact whether this property [is] serving a municipal purpose . . . was one which the Legislature . . . should properly decide, and its conclusion in that respect must be conclusive here unless it is clearly shown to be unreasonable." 75 F.2d at 167.

256. Moreover, the Supreme Court has already recognized that the construction, maintenance, repair, and operation of toll road projects are in furtherance of "public purposes" since such projects "further the public welfare, alleviate congestion on highways, and promote agricultural and industrial development, among others." *Ennis*, 108 N.E.2d at 693 (upholding the Toll Road Act in the face of constitutional challenge).

257. The fact that a private company might be operating the IFA's facility - that the Toll Road property may be leased from public hands to a private lessee - is irrelevant.

258. The text of Article 10, Section 1 "makes no reference to any element of ownership, but authorizes the Legislature to make certain exemptions based upon the purposes for which the property is used." *Babb*, 75 F.2d at 168. "It is the character of the

property, its use or purpose, and not the character or class of its owner" (or, in this case, the character or class of its lessee) that determines what property may be exempted. *Tieman v. City of Indianapolis*, 69 Ind. 375 (1879); *see, e.g., Vink v. Work*, 64 N.E. 83 (1902) (exempting property for the care and education of orphan and homeless children as being used for "charitable" purposes, even though it was a for-profit enterprise run by a private individual); *City of Indianapolis v. Sturdevant*, 24 Ind. 391 (1865) (holding property owned by a private, for-profit educational institution to be exempt from taxation because it was used for "educational" purposes); *Coll. Corner*, 840 N.E.2d 905 (property owned by limited partnership with for-profit member held exempt as being used for "charitable" purposes).

259. Thus, the tax exemption provided by HEA 1008 is for property that is and will be used for "municipal purposes."[14]

260. Accordingly, Plaintiffs have not established that they are likely to succeed on the merits of Count II of the Complaint. As noted hereinabove, the Court concludes that Count II directly questions the validity of the Toll Road Lease and therefore comes within the definition of a Public Lawsuit.

(c) Plaintiffs Failed to Demonstrate a Likelihood of Success on their Claims in Counts II and III of the Complaint, which allege that the State is unlawfully extending its credit to a private corporation in violation of Article 11, Section 12 of the Indiana Constitution, because these claims are premised on a failure to distinguish between the State and the IFA.

261. Plaintiffs also assert a variety of claims under Article 11, Section 12 of the Indiana Constitution, which prohibits "the credit of the State" from being "given, or loaned, in

[14] If Plaintiffs were correct, dozens of parcels of property used for municipal purposes would suddenly be subject to property tax. For example, municipal airfields are generally operated on public property leased to a private operator. Because the airfields are used for municipal purposes, they are tax exempt. Plaintiffs would ask the Court to reverse this well settled precedent. *See also Hawkins v. Greenfield*, 230 N.E.2d 396 (Ind. 1967) with regard to private benefit incidental to public purpose.

aid of any person, association or corporation." All of these claims ignore the well-settled distinction between the State and the IFA.

262. Count II of the Complaint attacks Section 3.10 of the Lease, which addresses payment of taxes. It states in shortened form and with emphasis:

> Except as otherwise provided herein, the Concessionaire shall pay when due all Taxes that are or become payable in respect of periods during the Term in respect of the operations at, occupancy of, or conduct of business in or from the Toll Road and fixtures or personal property included in the Toll Road Facilities. . . . For avoidance of doubt, the Concessionaire shall not be liable for, and *the IFA shall indemnify and hold the Concessionaire harmless* from and against, any (A) property Tax imposed . . . on the owner or lessee of the Toll Road Land or any fixtures or improvements thereto, (B) any sales, use or similar Tax imposed . . . on the Rent or the Toll Road Revenues or (C) any transfer, stamp, deed recording or similar tax payable by reason of the execution and delivery of this Agreement or the Short Form Lease or the recording of the Short Form Lease.

263. The text of this provision makes clear that the Lease does not put the *State's* credit at issue. It is "the IFA" — not the State — that "shall indemnify and hold the Concessionaire harmless" in the event the Concessionaire is required to pay certain taxes, and thus if anyone's credit is at issue, it's the IFA's.

264. It bears repeating: the IFA, as a matter of well-settled law, is not the State. The State is not party to the Lease; the Lease imparts no obligation to the State.

265. Count III of the Complaint likewise relies for its success on a failure to distinguish between the IFA and the State. It alleges:

> The Act contemplates a lengthy, seventy-five (75) year public private partnership in which, for a fee, the State agrees to provide policing and such other services as required by the lessee; in addition, the State agrees throughout this period, to facilitate such further financing as the lessee may from time to time need by, for example, subordinating the State's security interest(s) in valuable assets of the lessee. [Compl. ¶ 49.]

This, somehow, allegedly is an extension "of the credit of the State." *Id.* at ¶ 50.

266. These allegations misrepresent what HEA 1008 actually provides.

267. As to the allegation about the provision of policing services, it is the IFA — not the State — that has been authorized to arrange for policing. The IFA is authorized to "enter into agreements concerning the provision of law enforcement assistance with respect to a toll road project" (HEA 1008 § 39(a); § 8-15.5-10-7) and to "enter into arrangements with the state police department related to costs incurred in providing law enforcement assistance" (HEA 1008 § 39(b); IC § 8-15.5-10-7).

268. In addition, local and State law enforcement officers "have the same powers and jurisdiction within the limits of a toll road project as they have in their respective areas of jurisdiction." HEA 1008 § 39(c); IC § 8-15.5-10-7.

269. The Lease is consistent with these provisions. Although the IFA must arrange for and fund policing, the Concessionaire must reimburse the IFA for doing so at the level of several million dollars annually. In addition, the Concessionaire is responsible for paying the Indiana State Police directly for certain additional services. *See* Lease at § 3.16 ("On the Closing Date, the Concessionaire shall pay the ISP $5,000,000.00 for purposes of providing the ISP with funds for the capital improvements and equipment described on Schedule 3.16(e) and relating to ISP's provision of law enforcement services along the Toll Road as described in Section 3.16(a), above.").

270. In any event, it is entirely unclear how the State's provision of policing and "such other services" — initially paid for by the IFA and then reimbursed by the Concessionaire — constitutes an extension of "the credit of the State." The State Police will provide policing as a service to the traveling public, not just (or even primarily) to benefit to the Concessionaire.

271. With respect to Plaintiffs' claim that "the State" has agreed "to facilitate such further financing as the lessee may from time to time need by, for example, subordinating the State's security interest(s) in valuable assets of the lessee," it is unclear what Plaintiffs are referring to. *See* Compl. ¶ 49.

272. Nevertheless, a careful review of the Lease discloses no section that so obligates the State. The Lease is between the Concessionaire and the IFA, not the Concessionaire and the State.

273. Furthermore, under the enabling legislation, it is the IFA — not the State — that has the authority to enter into the sorts of financing arrangements to which Plaintiffs take exception. *See generally* HEA 1008 § 39.

274. The Lease cannot be interpreted to mean lending of credit – that action is forbidden; rather, the Lease must be interpreted to be constitutional.

275. As Plaintiffs note, the Lease does warrant that the Toll Road legislation "provides a moral obligation on the part of the State,"[15] but this is only "to provide the funds necessary in order to enable *the IFA* to comply with its payment obligations pursuant to this Agreement." Lease at § 9.1(p) (*emphasis supplied*).

276. The State's moral obligation is being used to back the obligations *not* of a private corporation, which is what Article 11, Section 12 was designed to prevent, *see Sendak v. Trustees of Ind. Univ.*, 260 N.E.2d 601, 602 (1970), but of a *public* organization created for a public purpose, which is perfectly acceptable. *See Ennis*, 108 N.E.2d at 698; *accord Orbison*, 179 N.E.2d at 733.

277. Extending the State's moral obligation to back the obligation of another does

[15] HEA 1008 § 39 (Chapter 10, § 3(b)(2): a public-private agreement may "create a moral obligation of the state to pay any amounts owed by the authority under the public-private agreement").

not constitute a pledge of the State's credit. *See, e.g.*, *Steup,* 402 N.E.2d at 1218-19; *see also Grubb, Inc. v. Iowa Hous. Auth.,* 255 N.W.2d 89, 98 (Iowa 1977).

278. Separate bodies, such as the Indiana Bond Bank and the Housing Finance and Community Development Authority, have the authority to seek appropriations from the State. *See, e.g.*, IC 5-1.5-5-4. The "moral obligation" to enhance the credit of their bond issuances as the cases make clear is not an unconstitutional lending of credit or debt. And, again, the State is not party to the Lease; the Lease does not create, and cannot create an obligation of the State. *See Steup*, 402 N.E.2d 1215; *see also Book*, 149 N.E.2d 273.

279. For all of these reasons, Plaintiffs failed to show a likelihood of prevailing on Counts II and III.

280. The unavoidable fact is that while the IFA is an instrumentality of the State, the IFA is not the State in its corporate sovereign capacity.

281. Accordingly, Plaintiffs have not established that they are likely to succeed on the merits of Counts II and III of the Complaint. As noted hereinabove, the Court has concluded that Counts II and III directly question the validity of the Toll Road Lease and therefore come within the definition of a Public Lawsuit.

(d) Plaintiffs have failed to demonstrate a likelihood of success as to Count IV (relating to the creation of local construction funds and the transfer of operation of the Indiana Toll Road) because HEA 1008 is General and because any "special legislation" provisions are justified by the unique characteristics of the counties or townships affected by HEA 1008, and because any such provisions do not fall within the categories of prohibited unconstitutional special laws.

282. Plaintiffs claim that the following provisions of HEA 1008 violate Article IV, Sections 22 and 23 of the Indiana Constitution:

(a) Section 39, which authorizes the transfer and continued operation of the

Indiana Toll Road by the Concessionaire;

(b) Sections 5 and 7, which create the Major Moves Construction Funds and provide for the distribution of funds only to northern counties in which the Toll Road passes; and

(c) Multiple sections which prohibit the construction of I-69 through Perry Township and limit the designation of the Indianapolis to Martinsville leg of the I-69 extension as a toll road. The challenge to the I-69 provisions will not be further addressed here because the Court has concluded that it is outside the scope of the Public Lawsuit Statute and therefore Plaintiffs will be permitted to proceed on this claim without the posting of a bond.

283. HEA 1008 does not violate Article IV, Section 22 or Section 23.

284. Article 10, Section 22 does not eliminate all special laws, but identifies sixteen (16) subjects on which special laws are prohibited.

285. Article IV, Section 23 of the Indiana Constitution provides in relevant part, "In all . . . cases where a general law can be made applicable, all laws shall be general."

286. Overall, HEA 1008 is not special legislation merely designed to achieve a particular result for a particular locale. The Act is designed to allow the completion of road construction and other projects throughout the entire state. (*See* Findings of Fact Section, *supra*.)

287. HEA 1008 and particularly Sections 5, 7, and 39 of that Act are designed not only to allow for the lease of the Indiana Toll Road, but also to fund road construction and other projects throughout the entire state. As such, HEA 1008 does not differ substantially from the legislation originally allowing for the designation of toll roads, legislation which our

Supreme Court has already found to be general legislation. *Ennis v. State Highway Comm'n*, 108 N.E.2d 687, 693 (1952) ("From a reading of the act in its entirety, it is apparent that it provides for the construction, operation, and maintenance of toll roads anywhere in the State of Indiana. The law applies to the entire state. It is neither local nor special. It is a general law under Sections 22 and 23, Article 4 of our Constitution.")

288. Defendants' Exhibit C shows that each of the State's 92 counties will receive a direct economic benefit under Sections 5, 7, and 39 as well as other provisions of HEA 1008. (*See* Defendants' Exhibit C.) Plaintiffs have conceded this fact. Plaintiffs' argument that some counties will receive more than others as a result of special funding schemes established by HEA 1008 does not change the general act into special legislation.

289. The General Assembly routinely appropriates money to local governments throughout the state based on its policy determinations with regard to local need, including specific designations for highways and local roads.[16] The mere fact that some individualized treatment results from the overall scheme of the legislation does not make the legislation special or run afoul of the constitution. *Cf. Ennis, supra.*[17]

290. The fact that certain locales are more directly impacted than others does not mean the legislation is special. *Cf. Dortch v. Lugar*, 266 N.E.2d 25, 36 (1971).

291. In interpreting a particular provision of the Indiana Constitution, a court must

[16] See IC 8-14-1-1 *et seq.* and 8-14-2-1 *et seq.*, each of which distribute funds in a manner that causes cities, towns, and counties to receive varying amounts of money based on population, miles of roadways and other factors. See also, IC 6-1.1-21-5, which replaces a portion of local property taxes in a manner that results in unequal distribution of such funds.

[17] Courts in other states have reached the same conclusion, finding that legislation does not become unconstitutional special legislation merely because it provides a specific benefit to a particular community. *Milwaukee Brewers Baseball Club v. Wisconsin Department of Health and Social Services*, 387 N.W.2d 254, 271-272 (Wis. 1986); *Larson v. Sando*, 508 N.W.2d 782, 785-786 (Minn. Ct. App. 1993).

seek "the common understanding of both those who framed it and those who ratified it." *State v. Hoovler*, 668 N.E.2d 1229, 1233 (Ind. 1996), *quoting Bayh v. Sonnenburg*, 573 N.E.2d 398, 412 (1991), *cert. denied*, 502 U.S. 1094, 112 S.Ct. 1170, 117 L.Ed.2d 415 (1992). In Webster's 1856 Dictionary, relied on by Justice Dickson for other purposes in *Hoovler*, the word "general" means, among other things, "5-Common to many or the greatest number … 9-Extensive, though not universal; common; usual … ." The broad provisions of the Act are general, notwithstanding the specific provisions emphasized by Plaintiffs.

292. Even if the elements of HEA 1008 identified by Plaintiffs (Sections 5, 7, and 39) could be characterized as special legislation, those provisions satisfy the requirements of the Indiana Constitution. (*See* Findings of Fact Section, *supra*; *see also* Post-Hearing Brief of Defendant IFA at pp. 11-15.)

293. The terms "general law" and "special law," have widely understood meanings. "A statute is 'general' if it applies 'to all persons or places of a specified class throughout the state.' A statute is 'special' if it 'pertains to and affects a particular case, person, place, or thing, as opposed to the general public.'" *Mun. City of South Bend v. Kimsey*, 781 N.E.2d 683, 688 (2003)(*quoting* Black's Law Dictionary 890 (7th ed. 1999)).

294. The first issue that must be addressed when a statute is challenged as an impermissible special law under Section 22 or 23 of Article IV is whether the law is "general" or "special." If the law is "general," the court must determine whether it is applied generally throughout the State. If the law is "special," the court must decide whether it is constitutionally permissible. *Id.*

295. The mere fact that a statute applies only to counties or townships falling within certain population criteria is not determinative of whether the statute is general or special. A

statute containing a population category is a special law "if it is designed to operate upon or benefit only particular municipalities and thus is essentially no different than if the statute had identified the particular municipalities by name." *Id*. at 691. If there are characteristics of the locality that distinguish it for purposes of the legislation and the legislation identifies the locality, the legislation is special legislation. The identification of the locality may be by name, by the characteristic that justifies the legislation, or by narrow population parameters that include only a very small number of localities. *Id*. at 692.

296. In order to pass constitutional muster under Article IV, a special law must satisfy two criteria. First, the legislation must be reasonably related to the "inherent characteristics" of the affected locale. Second, the legislation also must apply wherever the justifying characteristics are found. If the conditions the law addresses are found in a variety of places throughout the State, a general law can be made applicable; therefore, a general law is required and special legislation is not permitted. *Id*. at 692-693. Stated another way, a law limited to a given county is prohibited unless "there are inherent characteristics of the affected locale that justify local legislation." If the affected county reflects unique characteristics that rationally justify the legislation, then a general law is not "applicable" elsewhere and Section 23 is not violated." *State v. Lake Sup. Ct.*, 820 N.E.2d 1240, 1249 (2005)(*quoting Kimsey*, 781 N.E.2d at 692).

297. Further insight can be gained by looking at the practical application of the standard to specific facts. For instance, in *Kimsey* itself, the Court found that the statute in question constituted special legislation in violation of Article IV, Section 23. The statute applied only to counties with populations between 200,000 and 300,000 and permitted proposed annexation to be defeated by a simple majority of the landowners in the affected

area. St. Joseph County was the only county that fell within the population criteria; all other counties could defeat an annexation proposal only by a 65% vote of affected landowners. The Court concluded there was no justification for limiting the act to St. Joseph County, finding that there were no reasons supported by the record and no facts susceptible of judicial notice that demonstrated the uniqueness of St. Joseph County.

298. The *Kimsey* Court contrasted the facts in that case with the facts in *State v. Hoovler*, 668 N.E.2d 1229 (1996). The statute in question in *Hoovler* allowed a county with a population between 129,000 and 130,600 to impose a higher income tax rate than other counties in order to pay for environmental hazard removal and remediation projects. The Court concluded that the legislation was special legislation specifically aimed at Tippecanoe County, the only county that fell within the narrow population parameters. Tippecanoe County was also unique, however, in that it was the only county facing potential liability for a superfund clean-up site. Therefore, the restriction of the statute to Tippecanoe County was based on characteristics unique to Tippecanoe County, creating a factual basis for the County's assertion that a general statute could not apply, and allowing the statute to pass constitutional muster.

299. The *Kimsey* Court also distinguished *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296 (1994). There, the statute in question applied only to counties eligible to vote to adopt dockside gambling and bordering Lake Michigan with populations of more than 400,000 people (*i.e.*, Lake County) and allowed adoption of dockside gambling on a city-by-city basis. All other counties were required to consider dockside gambling on a countywide basis. The Court noted that Lake County was unique from other counties in which dockside gambling could be approved because virtually all of the land contiguous to the body of water

on which the operations could be placed was occupied by cities of significant size. In contrast, the contiguous land in the other counties was occupied by a mix of incorporated and unincorporated territories. The Court concluded the law did not violate Article IV, Section 23 because the unique characteristics of Lake County justified limiting the voting procedure provided for by the statute to Lake County.

300. The Indiana Supreme Court applied the *Kimsey* analysis in its most recent decision in the area, *Lake Superior Court*, 820 N.E.2d at 1250. There, the Court rejected a challenge under Article IV, Section 23 to legislation that allowed for a countywide reassessment of property taxes to be conducted only in Lake County by the Department of Local Government Finance and private contractors selected by the DLGF. The Court recognized that the legislation was a special law, but noted that the special legislation was justified by the history of "uneven assessment practices" in Lake County. The Court also acknowledged the significant percentage of industrial complexes in some taxing districts, which presented unique problems and required "great care."

301. When applying this analysis to a given set of facts, a court must be guided by several fundamental principles. First, a statute is presumed to be constitutional. *Kimsey*, 781 N.E.2d at 694. Additionally, when there are multiple interpretations of a statute, the court must accept any reasonable interpretation of the statute that renders the legislation valid. *Id*. Therefore, the party seeking to have a statute declared unconstitutional must bear the heavy burden of negating *every conceivable basis, which* might have supported the classification, and deference to the General Assembly is the rule. *Id*. Plaintiffs have not carried their burden of showing a substantial question as to the validity of Sections 5, 7, and 39 of HEA 1008.

(i) Section 5, 7, and 39 of HEA 1008 do not violate Article IV, Section 22.

302. Article IV, Section 22 prohibits all special laws in sixteen (16) enumerated categories.

303. **First**, overall HEA 1008 does not violate Article IV, Section 22 because HEA 1008 is "general" in nature. HEA 1008 is intended to benefit the State of Indiana as a whole.[18] The Act does not limit the use of the Toll Road.

304. **Second**, the only provision of Article IV, Section 22 that applies to Plaintiffs' claims specifically as to Chapters 5, 7 and 39, is the prohibition on special laws "providing for the laying out, opening, and working on, highways." By its own terms, Article IV, Section 22 requires that all three elements be present.

305. A common sense reading of this unambiguous language leads to the conclusion that none of the challenged provisions of HEA 1008 (Sections 5, 7, and 39) run afoul of the Constitution. The provisions allowing the transfer and operation of the Toll Road to the Concessionaire simply provide for the operation of that road, not for the "laying out, opening, **and** working on" it. (*emphasis supplied*).

306. Similarly, the provisions creating the Major Moves construction fund and allowing the distribution of fund proceeds to particular counties have nothing to do with the "laying out, opening, and working on" roads. Those provisions merely provide funds by which those counties can embark on their own projects at their discretion.

307. Our Supreme Court has clearly indicated it will strictly construe the prohibition on special laws in Article IV, Section 22. In *Hoovler*, *supra*, the Court rejected a constitutional challenge to a law that allowed Tippecanoe County to increase temporarily its county income tax to pay for environmental recovery and remediation projects. The Plaintiffs

[18] It is not unusual for the General Assembly to enact a general scheme that has specific impacts – examples include the school funding formula and the distribution of the motor vehicle excise taxes.

claimed the law violated Article IV, Section 22's prohibition on special laws "providing for the assessment and collection of taxes for State, county, township and road purposes." The Court noted that although the law affected the amount of tax paid by the taxpayers of the county, it did not provide for either the "assessment" or the "collection" of taxes, as those terms are commonly defined. "In light of our duty to construe statutes to be constitutional if reasonably possible," 668 N.E.2d at 1233, the Court concluded that the law did not violate Article 1, Section 22.

308. Here, none of the challenged provisions (Sections 5, 7**,** and 39) "provid[e] for the laying out, opening, and working on highways." Therefore, Plaintiffs' claims that these provisions violate Article IV, Section 22 must be rejected.

(ii) Sections 5, 7, and 39 do not violate Article IV, Section 23.

309. Plaintiffs claim that those same provisions of HEA 1008 referenced above (Sections 5, 7, and 39) with respect to Article IV, Section 23 also violate Article IV, Section 23.

310. **First**, HEA 1008 does not violate Article IV, Section 23 because, as discussed above, HEA 1008 is "general" in nature.

311. **Second**, and alternatively, the provisions assailed (Sections 5, 7, and 39) by Plaintiffs cannot be made general, *i.e.*, no general law is applicable; there is only one Toll Road, and only certain counties abut it.

312. As to the seven Northern counties, the Toll Road goes through those seven counties. Because of the rate increase as well as potential future rate increases, traffic would be diverted off of the Toll Road onto local roads. Funds would need to be given to those local units to help maintain those roads.

313. Based on the foregoing, Plaintiffs have failed to show a likelihood of success

on the merits of their Count IV claim that Sections 5, 7, and 37 of HEA 1008 violate Article IV, Sections 22 and 23 of the Indiana Constitution. As noted hereinabove, the Court concludes that these Count IV claims, at the very least, indirectly question the validity of the Toll Road Lease and therefore come within the definition of a Public Lawsuit.

(e) The Plaintiffs have failed to demonstrate a likelihood of success as to Count V in which they claim that both the Lease and HEA 1008 allow an unconstitutional grant of an exclusive franchise to a private company to operate a public work.

314. The benefits to the Concessionaire are no more subject to Article I, §23 scrutiny than the benefits conferred by any other government contract.

315. In their complaint, Plaintiffs assert that HEA 1008 and the Toll Road Lease "grant an exclusive franchise to a private company to operate a public work" and that this arrangement violates Article 1, §23's prohibition against unjustified special privileges. (Plaintiffs' Complaint, Count V.).

316. The Toll Road Lease and the legislation that authorizes it, HEA 1008, are supported by at least the following legitimate government interests: (1) realizing current value from the Toll Road to finance infrastructure-improvement projects; (2) maintaining the Toll Road; (3) the administrative convenience of dealing with the same company that operates the connecting toll road in Illinois (i.e., the Chicago Skyway); and (4) the administrative convenience and value generated by dealing with only one lessee.

317. Plaintiffs' Article I, §23 claim appears to be based upon an objection to the concept of public-private agreements of the sort authorized by HEA 1008. There appears substantial evidence that Indiana agencies frequently enter into contracts whereby private enterprise pays money to operate for-profit enterprises using state assets, particularly state

parks. Concession operations are found throughout the state for various purposes, including Hoosier Hills Marina at Patoka Lake; Lake Monroe Boat Rental and Store; Harmonie Pool/Camp Store; Wyandotte Caves Gift Shop; Mississinewa Firewood Vending; Chain-O-Lakes Camp Store; Hardy Lake Mooring. See Ind. Code §§ 14-18-2, 14-18-3, 14-18-4, 14-19-1-2. There is no material distinction between the Toll Road Lease and these concession agreements. All are with private companies, all are authorized by generally worded statutes (i.e., statutes that authorize deals, negotiated by the agencies and that do not name any specific concessionaire as the only permissible contractor), all are "exclusive" in some sense (e.g., there is only one marina at Patoka Lake), and all were open for competitive bidding.

318. There is no reason to distinguish the Toll Road Lease from other government contracts, or even grants. All government contracts with private companies must be authorized by statute, all benefit the private contractors, and all are exclusive at some level (grants may have multiple recipients, but that class of recipients is still treated specially). The Indiana Supreme Court, applying the standard for Article 4, §23 (again, functionally the same standard that applies to this Article I claim) very recently upheld legislative authority for a single contract to conduct property-tax assessments in only one Indiana county. See *State, ex. rel. Atty. General v. Lake Superior Court*, 820 N.E.2d 1240, 1249-50 (Ind. 2005). There is no distinction between that sort of single-beneficiary contract and the Toll Road Lease. Thus, the Toll Road Lease and its authorizing legislation appear valid under Article I, §23 regardless of any "exclusive franchise" or any other benefit provided to the Concessionaire in the Lease.

(f) Count VI must fail as moot.

319. In Count VI of the Complaint, Plaintiffs ask this Court to declare the Lease invalid and to enjoin its enforcement on the ground that the Concessionaire is not registered to do business with the Indiana Secretary of State and has not obtained authority from the

Secretary of State to transact business in the State of Indiana.

320. Since the initiation of this lawsuit, the Concessionaire has registered with the Indiana Secretary of State and has obtained the appropriate authority to do business in the State of Indiana, thereby eliminating the basis for this claim against the Concessionaire.

321. Moreover, as established on the face of the Lease, SMP is not a party or a signatory to the Lease. SMP is not doing business in Indiana and has no obligation to register with the Indiana Secretary of State.

322. SMP is also not a proper party Defendant in this action.

323. Count VI of the Complaint, relating to entities not authorized to do business in the State of Indiana, is therefore moot and fails to present a justiciable issue to be decided.

(g) Count VII Fails because Plaintiffs lack Standing to bring this claim.

324. Plaintiffs lack standing to challenge the statute of limitations provision of HEA 1008.

325. A court must address the issue of standing before addressing any constitutional claim. *Board of Comm'rs of Howard County v. Kokomo City Plan Comm'n*, 330 N.E.2d 92 (1975).

326. To have standing to assert a constitutional claim, the party making the claim before the court must have a substantive right to enforce. *Pence v. State*, 652 N.E.2d 486, 487 (1995).

327. That a particular statute is invalid is almost never a sufficient rationale for judicial intervention. The party challenging the law must show adequate injury or the immediate danger of sustaining some injury. *Id*. at 488.

328. If the party asserting the claim cannot establish that his rights were adversely

affected by application of the challenged statute to him, he lacks standing to challenge the constitutionality of the statute. *Gross v. State*, 506 N.E.2d 17, 21 (1987).

329. Here, Plaintiffs claim the fifteen (15) day limitations provision contained in HEA 1008 is unconstitutional.

330. Despite this argument, Plaintiffs brought this action within the fifteen (15) day limit.

331. Therefore, Plaintiffs have suffered no injury as a result of the limitations provision and lack standing to challenge it. *See Pence*, 652 N.E.2d 486; *see also Gross*, 506 N.E.2d 17.

332. As a result, Plaintiffs failed to show a likelihood of success on the merits of Count V of their Complaint. As noted hereinabove, the Court concludes that Count V, at the very least, indirectly questions the validity of the Toll Road Lease and therefore comes within the definition of a Public Lawsuit.

(h) Count VIII claims that certain provisions of HEA 1008 violate Article III, §1 (separation of powers) of the Indiana Constitution. The challenged provisions are clearly severable from HEA 1008 and therefore in no way threaten the validity of the Act or the Toll Road Lease. Thus this claim is not a part of plaintiffs' public lawsuit but should be expeditiously resolved by summary judgment.

333. Plaintiffs claim HEA 1008 violates Article III of the Indiana Constitution, which distributes the powers of Government among the three branches of government.[19]

[19] Specifically, Article III provides:

> The powers of the government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

334. Plaintiffs take issue with the fact that the legislation permits "the Governor, INDOT and/or the IFA to turn any road in this State, with the exception of that portion of Interstate 69 running from Indianapolis to Martinsville, into a toll road." Compl. ¶ 75. "The designation of an existing highway as a Toll Road," Plaintiffs claim, "is a legislative function." *Id.* at ¶ 76.

335. In the alternative, Plaintiffs allege the designation of a toll road is an "executive function," which if true, Plaintiffs say, renders unconstitutional the Indianapolis-to-Martinsville provision. *Id.* at ¶ 78.

336. Defendants argue that if designating a toll road is in fact a legislative function, the issue has been decided. *Ennis* resolved the issue over 50 years ago. 108 N.E.2d at 694-95.

337. Under the Toll Road legislation at issue in *Ennis*, the Toll Road Commission had authority to construct, maintain, repair, and operate toll road projects "at such locations as shall be approved by the governor, and in accordance with such alignment and design standards as shall be approved by the highway commission." *Id.* at 694. The Plaintiffs alleged that the General Assembly had delegated too much authority to the Commission without first establishing sufficient standards to guide it in the exercise of that authority, in violation of Article 4, Section 1 of the Indiana Constitution.[20] The Court disagreed:

> The toll road commission is given broad powers to locate toll roads, but this is not in violation of the Constitution. The powers here delegated are no broader than the powers granted to the State Highway Commission in selecting and constructing highways in this state. After considering the sections of the statute heretofore cited, and the specific nature of the purposes to be accomplished by this act, *and the fact that locations of all projects must be approved by the Governor*, it seems

[20] Article 4, Section provides that "[t]he Legislative authority of the State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

> that the standards set are as specific, definite, and certain as the necessities of the case permit. The foregoing provisions fix reasonable standards for the determination of the location of such projects. [*Id.* at 694-95 (*internal citations omitted and emphasis added*).]

338. According to the Defendants, HEA 1008 only slightly modifies the language held to be constitutional in *Ennis* and, with the exception of the provision relating to Martinsville, HEA 1008 does not add the language that Plaintiffs appear to challenge, which language Defendants assert has been part of the Code since the 1950's.

339. For example, Indiana Code Section 8-15-2-1, as amended by HEA 1008 § 8, states that the IFA may, "subject to subsection (d), construct, reconstruct, maintain, repair, and operate toll road projects at such locations as shall be approved by the governor . . . ." The only part that HEA 1008 adds to this statute is the language "subject to subsection (d)". It does appear that the Governor's approval has been a feature of the law relating to the designation of toll roads since the first Toll Road bill was first passed in the 1950s, as documented in *Ennis*.[21]

340. Defendants argue that, Plaintiffs are barred by the doctrine of laches from even challenging this language. In *SMDfund, Inc. v. Fort Wayne-Allen County Airport Authority*, 831 N.E.2d 725 (2005), the Plaintiffs sought a declaration that the Airport Authority was invalid and an injunction to prevent the Authority from closing an airfield. The Court held that laches barred the Plaintiffs' claim. The statute at issue had been enacted in 1985, more than seventeen years before the Plaintiffs brought suit. In the intervening time period, the

[21] *See also, e.g.*, IND. CODE § 8-15-3-9, as amended by HEA 1008 § 23) ("**Subject to subsection (e),** the governor must approve the location of any toll way . . . ."); IND. CODE § 8-23-7-22, as amended by HEA 1008 § 41 ("**Subject to subsection (b),** the department may, after issuing an order and receiving the governor's approval, determine that a state highway should become a toll way."); IND. CODE § 8-23-7-23, as amended by HEA 1008 § 42 ("**Subject to subsection (c),** the department may, after issuing an order and receiving the governor's approval, determine that a state highway should become a toll road."). The bolded language was added by HEA 1008.

Airport Authority had raised taxes, issued bonds, and taken other action necessary to operate the airports within its jurisdiction, all in reliance on the Authority's valid existence.

341. Defendants maintain that the case before this Court presents an identical situation. The challenged statutory language regarding Governor approval was enacted in the early 1950s, more than *fifty* years before Plaintiffs brought suit. The Supreme Court already found it to be constitutional. Since that time, the Governor has approved toll road projects, namely the Indiana East-West Toll Road. *See* IC § 8-15-2-1(a)(1)(providing the Governor's authority to approve toll roads ("subject to subsection (d), construct, reconstruct, maintain, repair, and operate toll road projects at such locations as shall be approved by the governor; ... .")). The General Assembly has likewise relied on this language, keeping it on the books and re-codifying on occasion throughout the last half of the twentieth century, and now into the early twenty-first century. Defendants assert that the time for challenging these statutes was when they first became law, (*See id.* at 729) and therefore Plaintiffs' challenge comes far too late.

342. Defendants further assert that, as to the Martinsville provision, there is no delegation to the Executive branch; indeed, the Legislature is telling the Executive to come back for approval before any action is taken and therefore no unconstitutional delegation exists.

343. The Court has searched the Plaintiffs' pre-hearing and post-hearing briefs but can find no arguments put forth as to this issue. The Court has found Plaintiffs' Article III, §1 challenge to be one that does not come within the definition of a Public Lawsuit and therefore can be pursued by the Plaintiffs without the necessity of posting a bond. However, it is a claim that should be resolved by one side or the other filing a Trial Rule 56 motion for

summary judgment since it appears there is no genuine issue as to any material fact and presents only a question of law.

(i) The Plaintiffs have failed to demonstrate a likelihood of success on their Equal Privileges and Immunities Claims because the Act clearly provides benefits to all citizens and any Special Burdens or Privileges are Related to the Inherent Characteristics of the Affected Classes.

344. A statute must pass two requirements to survive a privileges and immunities challenge under Article I, Section 23 of the Indiana Constitution.

345. First, the disparate treatment accorded by the legislation (if any) must be reasonably related to inherent characteristics that distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. *Collins v. Day*, 644 N.E.2d 72, 78-80 (1994).

346. As with other constitutional claims, application of this standard requires "considerable deference to the manner in which the legislature has balanced the competing interests involved." *Id*. at 80. The statute is presumed to be constitutional and the burden is upon the challenger "to negate *every conceivable basis* which might have supported the classification." *Id*. (emphasis added).

347. Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable. So long as the classification is based upon substantial distinctions with reference to the subject matter, the Court will not substitute its judgment for that of the General Assembly; nor will the Court inquire into the legislative motives prompting such classification. *Chaffin v. Nicosia*, 310 N.E.2d 867, 869 (1974).

348. Plaintiffs' privileges and immunities claims, which are scattered throughout the Complaint, essentially encompass three (3) basic contentions:

349. **First**, Plaintiffs claim that the distribution of funds to counties across the northern border of the State through the Major Moves construction funds violates Article I, Section 23 by providing citizens of those counties benefits not provided to citizens in the remainder of the State. (Count I and Count IV).

350. **Second**, Plaintiffs focus on the benefits provided to the Concessionaire, including the exemption from certain taxes, the provision of police protection, the IFA's agreement to refrain from operating roads in competition with the Concessionaire, the facilitation of financing, and the suspension of the prevailing wage. Plaintiffs claim that these terms violate Article I, Section 23 because they provide the Concessionaire with benefits not provided to other companies operating in the State. (Counts II, III and V).

351. **Third**, Plaintiffs challenge those portions of the Act that prohibit the construction of the I-69 extension in Perry Township and prohibit designating a portion of that highway as a toll road, and limit the construction of additional toll roads. Plaintiffs claim that these provisions provide benefits to citizens of some portions of the State, but not to others. (Count IV). As previously noted, this challenge does not constitute a public lawsuit. If the Plaintiffs are successful, the relevant provisions are clearly severable and will not affect the validity of the remainder of HEA 1008 or the Toll Road Lease, therefore, this claim shall proceed without the posting of a bond.

352. When read as a whole, the Act appears to provide benefits to citizens and companies across the State. Although some of those benefits are provided through the various construction funds, other benefits are provided with general revenues that will be used to finance a variety of road construction and other projects across the entire State. Citizens of the northern counties, as well as the Concessionaire, are not receiving disparate treatment; the

entire State of Indiana appears to be receiving benefits from this Act.

353. To the extent the Act can be read as providing citizens of certain counties with greater benefits than citizens of other counties, the perceived disparity is both rational and justified. (*See* Fn. 22.)

354. Moreover, to the extent that the Act can be read as providing the Concessionaire with benefits not provided to other companies operating in the State, the Act itself provides both findings with respect to Public-Private Partnerships and a statement of intent with respect to Public-Private Partnerships, which provisions indicate not only that any perceived disparity is both rational and justified but also that the entire State of Indiana benefits from the Act. *See Hawkins v. Greenfield*, 230 N.E.2d 396 (1967).

355. As the General Assembly found, HEA 1008 is a general law affecting the State uniformly. (*See* Findings of Fact Section, *supra*, *quoting* IC 15.7-1 and IC 15.7-3.)

356. None of Plaintiffs' witnesses explained how HEA 1008 treats different groups unfairly, and there has been no attempt to undermine the Indiana General Assembly's determinations. Plaintiffs presented no additional evidence at the Hearing.

357. Based on the foregoing, Plaintiffs have failed to demonstrate a reasonable likelihood of success on their privileges and immunities challenge under Article I, Section 23 of the Indiana Constitution, at least as to the first two of their aforementioned contentions only.

(3) The Harm Granting the Requested Relief Would Cause Defendants.

358. The Public Lawsuit Statute requires the Plaintiffs to come forward with evidence sufficient to avoid the posting of a bond. Plaintiffs failed to establish facts that would entitle them to a temporary injunction; they did not make the necessary showing that there is a substantial issue to be tried on their claims. However, Plaintiffs' claims contained

in Count IV relating to the I-69 provisions and Count VIII are not a part of the Public Lawsuit and shall proceed without any requirement that Plaintiffs post a bond.

359. As set forth more fully in the Findings of Fact, the harm to the IFA and to the State and local governments in every county by reason of the filing and pendency of Plaintiffs' Public Lawsuit may likely be substantial. The Court must determine the monetary value of the damages likely to be suffered by the pendency of Plaintiffs' Public Lawsuit, if the Defendants ultimately prevail.

360. Plaintiffs assert that the IFA will suffer no damages. As proof of this, they point to the testimony of their expert witness, Mr. Roger Skurski, who opined that the net present value of the Indiana Toll Road was at least $5.35 billion and, therefore, the IFA would not lose money, it would gain money if the execution of the Lease Agreement was thwarted. On the other hand, the IFA's expert Crowe Chizek and Co. LLC opined that the net present value of the Toll Road is $1.92 billion. If correct, it would mean that the IFA would suffer a substantial loss if the execution of the Lease Agreement was thwarted.

361. Crowe Chizek's valuation is based in large part on the historical operation and performance of the Toll Road and projections based thereon including substantial toll increases during the next five (5) years and toll increases thereafter consistent with historical rate changes over the past fifty (50) years. Having performed external audits for the Toll Road operation over the past fifteen (15) years, Crowe Chizek is familiar with the operation and performance of the Toll Road.

362. It is undisputed that the IFA will receive $3.8 billion if the Lease goes to closing on June 30, 2006 and will lose that amount if the pending Public Lawsuit causes the Concessionaire to refuse to execute the lease for good cause.

363. Crowe Chizek was engaged by the IFA to perform its financial analysis of the Toll Road operations over the next seventy-five (75) years after the $3.8 billion Lease bid was received by the IFA from the ITR. Skurski was retained by the Plaintiffs in conjunction with and for the purposes of their lawsuit. Both experts may have some motivation to be supportive of the positions of their respective clients.

364. Mr. Skurski has been a professor of economics at the college level for over forty (40) years. He has no professional experience other than consulting work in which he has valued losses in wrongful death and personal injury cases. Mr. Skurski has never before tried to determine the net present value of the future cash flows of an operating asset and it is quite clear from all of the evidence that this is not an easy thing to do.

365. During his testimony, Mr. Skurski expressed some rather unrealistic assumptions about the likelihood that under the continued operation of the IFA, the Toll Road could do as well financially as it could under private control. The assumption is unrealistic in the sense that it ignores the historical performance of the public operation of the Toll Road over the past fifty (50) years by simply stating, in effect, that if the private sector can figure out a way to make a lot of money operating the Toll Road, the public sector can do so as well. He may be right, but history is not on his side.

366. Additionally, Skurski ignores certain obvious public policy considerations that would likely cause the IFA to run the Toll Road quite differently than a private entity. The Toll Road generates income from two sources, tolls and fees collected from the Concessionaires that operate along the Toll Road. Skurski justifies using the maximum or close to the maximum toll rates allowable under the Lease in his calculations because he assumes that anyone who operates the Toll Road will charge customers as much as they can

in order to maximize profits. He further suggests that even if charging significantly higher toll rates substantially reduces the number of citizens that use the Toll Road, a greater profit can still be realized by serving fewer customers who are paying substantially higher toll rates. From a private entity's point of view, fewer customers utilizing the Toll Road would likely reduce the wear and tear on the asset thereby reducing the overall cost of maintenance and repair. Although this prospect may not bode well for those who will regularly use the Toll Road, that concern is not part of the legal questions before the Court today.

367. Skurski's assumptions ignore a major public policy consideration that government must and the private sector may or may not consider. As a primary public policy consideration, government must seek to provide and make available a public improvement, such as the Toll Road, to the greatest number of people. Generating profit has not historically been a primary government public policy concern. In addition, government must contend with the public's expression of displeasure over high toll rates at the ballot box. This is something the private sector does not have to deal with.

368. Generally speaking, private for profit businesses must have as one of their primary policy considerations the making of a profit, otherwise they will not survive, and if they do, they will not survive well.

369. Skurski also assumes that the IFA can and will operate the Toll Road as efficiently as a private entity will. This is a laudable goal but there is no historical data or other evidence presented to support such a proposition. In theory, the IFA should be able to do exactly what a private entity would do to maximize efficiency in the operation of the Toll Road and generate maximum profits, but that's all it is, a theory. There is no evidence before the Court that it has done so in the past or that it can or will do so in the future, if the IFA

continues to operate the Toll Road. Public entities have certain bureaucratic hurdles to contend with, some are imposed by law and some are cultural. Private entities can frequently cut through bureaucracy and thereby achieve greater efficiency.

370. Because of the inherent differences between the way the public sector and private sector are likely to operate the Toll Road, it is not surprising that Skurski and Crowe Chizek came up with very different values, with the Toll Road being worth considerably less in the hands of the IFA and considerably more in the hands of a private entity.

371. The Court concludes that it should factor into its determination of the potential loss to the IFA, the net present value of the Toll Road to the IFA if it is thwarted in its efforts to lease the Toll Road on June 30, 2006 and must continue to operate it.

372. While the Court has some concerns about the objectivity of both experts in this matter, their evidence is all there is. The opinions of accountants or economists with complete independence from the parties and the political tornado surrounding HEA 1008, the Toll Road Lease and this litigation might have better informed the Court as to the potential harm to the IFA of this pending Public Lawsuit, if the IFA eventually prevails.

373. Based on the limited evidence before the Court, the Court concludes that the Toll Road has a net present value of $1.92 billion if the operation of the Toll Road remains in the hands of the IFA. There is little doubt that in the hands of a private entity the Toll Road will likely be worth substantially more. This answers a question asked early on in this litigation by the Plaintiffs: how is it possible for the Toll Road Lease Agreement to be a good deal for both the IFA and the ITR? Although the question is irrelevant to the issues now before the Court, at least there is an answer.

374. Whether or not the Lease is a "good deal" is irrelevant; the Lease arrangement is based on the highest bid received by the State and allows the IFA to receive an

up-front payment of $3.8 billion. The issues before the Court, at this time are whether or not any or all of Plaintiffs' claims constitute a public lawsuit and if so, whether or not Plaintiffs should be required to post a bond.

375. The testimony of Mr. Skurski as to the net present value of the Toll Road over the next seventy-five (75) years is too speculative to be used to determine the damages that may accrue to the IFA by reason of the pendency of the Public Lawsuit in the event the IFA prevails.

376. Therefore, there should be deducted from the Lease payment of $3.85 billion the net present value of the Toll Road calculated at $1.92 billion, leaving a potential loss of approximately $1.9 billion.

377. Based on the fact that Plaintiffs have failed to demonstrate a reasonable likelihood of success on the merits or a substantial issue for trial on all of their claims that are included within the Public Lawsuit a bond with surety to be approved by the Court and payable to the Defendants for the payment of all damages and costs that may accrue by reason of the filing of the public lawsuit must be set.

378. Defendants may suffer damages and costs if the Public Lawsuit proceeds but is ultimately unsuccessful in the amount of at least $1.9 billion.

379. A bond in an amount of, at least, $1.9 billion is required to protect the IFA from the costs and damages that may accrue by reason of the pendency of this Public Lawsuit, if the Defendants, particularly the IFA, prevail. If the Plaintiffs are unable to post said bond within ten (10) days from the entry of this order, this Public Lawsuit must be dismissed.

IV. ORDER

Defendants the Indiana Finance Authority, Mitchell E. Daniels, Jr., in his official capacity as Governor of Indiana, Tim Berry, in his official capacity as Treasurer of Indiana, and the Indiana Department of Transportation (collectively "Defendants"), by their respective counsel, having filed their Petition to Certify as a Public Lawsuit and to Establish Surety bond

and/or in the Alternative to Dismiss, and the Court having reviewed said Petition and considered all of the evidence, arguments, and law regarding the matter and being duly advised in the premises, now GRANTS said Petition for good cause shown, except as to Count IV relating to the I-69 provisions and Count VIII.

IT IS, THEREFORE ORDERED, ADJUDGED, AND DECREED that:

A. Defendants' Petition to Certify as a Public Lawsuit is hereby GRANTED. This Court hereby certifies this action as a "Public Lawsuit" governed by the relevant provisions of the Indiana Code except for the portion of Count IV relating to the constitutional challenges to the I-69 provisions and Count VIII which are not part of this "Public Lawsuit";

B. Defendants' Petition to Establish Surety Bond and/or in the Alternative to Dismiss is hereby GRANTED. This Court hereby establishes a surety bond pursuant to the Public Lawsuit provisions of the Indiana Code in the amount of $1.9 billion and, in the event that Plaintiffs do not post said bond with a surety within ten (10) days of this Order, as set forth in the Public Lawsuit Statute of the Indiana Code, this lawsuit shall be dismissed with prejudice except for Counts IV relating to the constitutional challenge to the I-69 protections and Count VIII, which shall proceed without the necessity of the Plaintiffs' posting bond.

A copy of this Order shall be mailed to all attorneys of record by regular mail.

All of which is considered and ordered this 26th day of May, 2006.

/s/ Michael P. Scopelitis
Judge Michael P. Scopelitis
St. Joseph Superior Court

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